TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. [redacted]27.

PENN REFINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY AND SAMUEL G. DE COURSEY, RECEIVER THEREOF; WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, AND LEHIGH VALLEY RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED MAY 4, 1908.

(20,243.)

(20,243.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 285.

PENN REFINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY AND SAMUEL G. DE COURSEY, RECEIVER THEREOF; WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, AND LEHIGH VALLEY RAILROAD COMPANY.

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1 In the Circuit Court of the United States for the Western District of Pennsylvania.

No. —, —— Term, 1903.

PENN REFINING COMPANY, LIMITED,
vs.
WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, Receiver Thereof; THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY, and THE LEHIGH VALLEY RAILROAD COMPANY.

In the Circuit Court of the United States for the Western District of Pennsylvania.

Among the rolls, records and judicial proceedings had in the Circuit Court of the United States in and for the Western District of Pennsylvania at No. 23 of May Term, 1901, may be found the following words and figures, to wit:

Docket Entries.

PENN REFINING COMPANY, LIMITED,
vs.
WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, Receiver Thereof; THE WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, and THE LEHIGH VALLEY RAILROAD COMPANY.

Petition and exhibits filed April 11, 1901: 1901, June 28, order fixing date and place of trial filed; 1901, July 15, precipe for appearance of Patterson & Sterrett, Esqs., for Western New York and Pennsylvania Railway Co. filed; 1901, August 6, trial postponed to November Term; 1901, September 10, answer of Western New York and Pennsylvania Railroad Company and Samuel G.
2 De Coursey, the receiver thereof filed; *Eo die,* answer of Western New York and Pennsylvania Railway Company filed; 1901, October 29, precipae for appearance of Francis I. Gowen, Esq., and John G. Johnson, Esq. for Lehigh Valley Railroad Company filed; 1901, October 29, demurrer of Lehigh Valley Railroad Co. filed; 1901, Nov. 9, demurrer argued C. A. V.; 1901, November 13, additional cause for demurrer by Lehigh Valley Railroad Company filed by leave of Court; 1901, December 31, order filed overruling demurrer of the Lehigh Valley Railroad Company, with leave to answer within thirty days; 1902, February 5, answer of The Lehigh Valley Railroad Company filed; 1902, April 18th, this cause fixed for trial May 19th 1902.

And now, to wit, May 19th, 1902, the parties to this cause being at issue, a jury being called, came, viz: Thos. E. Null, W. H. Bricker,

of said company at Susquehanna, Pa., and informing him of the contents thereof. April 24th, 1902, at New York City, New York, served the within order and petition accompanying the same upon E. B. Thomas and J. G. McCullough, Receivers of the New York, Lake Erie and Western Railroad Company, by giving a true and attested copy of each to each of said Receivers and informing each of them of the contents thereof. So answers Stephen P. Stone, U. S. Marshal. 1902, May 7th, Answers of the Erie Railroad Company, The New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, as Receivers filed.

And now, May 23rd, 1902, the parties to this cause being at issue a jury being called came, viz: P. M. Caster, J. Wiley Day, Geo. W. Mackall, James F. Morris, Alexander Boyd, Wm. McGarvey, H. M. Masserall, C. A. Cadwallader, Chas. G. McCleary, M. A. Reed, J. C. Bunting and John Fleming, twelve good and lawful men who having been duly summoned, were balloted for, impanneled and sworn to
well and truly try this issue joined and a true verdict render
6 according to the evidence, and the jury having heard the evidence, arguments and charge of the Court, do say, "We find for the plaintiff the sum of five hundred fourteen and 30/100 ($514.30) dollars." 1902. May 24th, Motion, reasons and rule for new trial filed. 1903, February 12th, Opinion of the Court overruling motion for new trial and directing judgment to be entered upon the verdict filed. And now, to-wit: February 12th, 1903, judgment is hereby entered upon the verdict in pursuance with the foregoing opinion. 1903, March 2nd, Plaintiff's bill of costs filed. 1903, March 2nd, Petition for appeal filed. 1903, March 2nd, Assignments of error on behalf of Erie R. R. Co. filed. 1903, March 2nd, Assignments of error on behalf of J. G. McCullough and E. B. Thomas, Receivers of N. Y., L. E. & W. R. R. Co. filed. 1903, March 2nd, Assignments of error of Western New York and Pennsylvania Railroad Co. and Samuel G. De Coursey, the Receiver thereof, the Western New York and Pennsylvania Railway Company, and the Delaware and Hudson Canal Company filed. 1903, March 2nd, Assignments of Errors of New York, Lake Erie and Western Railroad Company filed. 1903, March 2nd, Bond *sur* writ of error filed. *Eo die*, Bill of exceptions of the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof, the Western New York and Pennsylvania Railway Company, and the Delaware and Hudson Canal Company filed. *Eo die*, Bill of exceptions of New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, Receivers thereof, and the Erie Railroad Company filed. 1903, March 4th, Writ of Error allowed and issued. 1903, March 4th, Citation awarded, issued and served.

7 In the Circuit Court of the United States for the Western District of Pennsylvania.

Among the rolls, records and judicial proceedings had in the Circuit Court of the United States, in and for the Western District of

Pennsylvania, at No. 29 of May Term, 1901, may be found the following words and figures, to-wit:

Docket Entries.

RUBEN L. RICE and JOS. C. ROBINSON, as Members of the Firm of Rice & Robinson, and Successors of the Firm of Rice, Robinson & Witherop,

vs.

WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, the Receiver Thereof; THE WESTERN NEW YORK & PENNSYLVANIA RAILWAY COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON & MAINE RAILROAD COMPANY.

Petition and Exhibits filed April 11, 1901. 1901, June 28, Order fixing date and place of trial filed. 1901, July 13, Præcipe for appearance of Patterson & Sterrett, Esqs., for Western New York and Pennsylvania Railroad Company filed. 1901, August 6, Trial postponed to November Term. 1901, September 10, Answer of Western New York and Pennsylvania Railroad Co. and Samuel G. De Coursey, the Receiver thereof, filed. 1901, September 10, Answer of Western New York and Pennsylvania Railroad Company filed. 1901, October 4, Præcipe for appearance of George A. Long, Esq., for Fitchburg Railroad Company filed. 1902, January 25, Answer of Fitchburg Railroad Company filed. 1902, April 18, it is ordered that the trial of this cause be fixed for the 19th day of May, 1902, and that the Marshal forthwith serve a copy of this order and the petition upon the defendants who have not appeared or answered, said service to be made within the District if the same can be done, if not, then whenever service can be obtained. April 23, 1902, at Boston,
8 M[illegible]., served the within order and petition upon the Boston and Maine Railroad Co. by giving a true and attested copy of each to H. E. Fisher, Treasurer of said Company, at the office of said Company, and informing him of the contents thereof. So answers Stephen P. Stone, U. S. Marshal, W. D. of Penna. 1902, May 19, Answer of Boston and Maine Railroad filed. And now, May 26th, 1902, the parties to this cause being at issue a jury being called came, viz: Chas. G. McCleary, W. H. Gelbach, James F. Morris, W. M. Remaley, J. C. Bunting, Chas. E. Meals, Alexander Boyd, C. A. Cadwallader, Geo. W. Mackall, H. M. Misserall, Wm. McGarvey and M. A. Reed, twelve good and lawful men, who having been duly summoned and returned, were balloted for, impanneled and sworn to well and truly try this issue joined and a true verdict render according to the evidence, and the jury having heard the evidence, arguments and charge of the Court, after due deliberation, do say: "We find for the plaintiff in the sum of Seven hundred forty-one and 08/100 ($741.08) dollars."

1902, May 26th, points on behalf of each and all of the defendants filed. 1902, May 27th, motion, reasons and rule for new trial filed by leave of Court. 1903, February 12th, opinion of the Court over-

of said company at Susquehanna, Pa., and informing him of the contents thereof. April 24th, 1902, at New York City, New York, served the within order and petition accompanying the same upon E. B. Thomas and J. G. McCullough, Receivers of the New York, Lake Erie and Western Railroad Company, by giving a true and attested copy of each to each of said Receivers and informing each of them of the contents thereof. So answers Stephen P. Stone, U. S. Marshal. 1902, May 7th, Answers of the Erie Railroad Company, The New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, as Receivers filed.

And now, May 23rd, 1902, the parties to this cause being at issue a jury being called came, viz: P. M. Caster, J. Wiley Day, Geo. W. Mackall, James F. Morris, Alexander Boyd, Wm. McGarvey, H. M. Masserall, C. A. Cadwallader, Chas. G. McCleary, M. A. Reed, J. C. Bunting and John Fleming, twelve good and lawful men who having been duly summoned, were balloted for, impanneled and sworn to
well and truly try this issue joined and a true verdict render
6 according to the evidence, and the jury having heard the evidence, arguments and charge of the Court, do say, "We find for the plaintiff the sum of five hundred fourteen and 30/100 ($514.30) dollars." 1902. May 24th, Motion, reasons and rule for new trial filed. 1903, February 12th, Opinion of the Court overruling motion for new trial and directing judgment to be entered upon the verdict filed. And now, to-wit: February 12th, 1903, judgment is hereby entered upon the verdict in pursuance with the foregoing opinion. 1903, March 2nd, Plaintiff's bill of costs filed. 1903, March 2nd, Petition for appeal filed. 1903, March 2nd, Assignments of error on behalf of Erie R. R. Co. filed. 1903, March 2nd, Assignments of error on behalf of J. G. McCullough and E. B. Thomas, Receivers of N. Y., L. E. & W. R. R. Co. filed. 1903, March 2nd, Assignments of error of Western New York and Pennsylvania Railroad Co. and Samuel G. De Coursey, the Receiver thereof, the Western New York and Pennsylvania Railway Company, and the Delaware and Hudson Canal Company filed. 1903, March 2nd, Assignments of Errors of New York, Lake Erie and Western Railroad Company filed. 1903, March 2nd, Bond *sur* writ of error filed. *Eo die,* Bill of exceptions of the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof, the Western New York and Pennsylvania Railway Company, and the Delaware and Hudson Canal Company filed. *Eo die,* Bill of exceptions of New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, Receivers thereof, and the Erie Railroad Company filed. 1903, March 4th, Writ of Error allowed and issued. 1903, March 4th, Citation awarded, issued and served.

7 In the Circuit Court of the United States for the Western District of Pennsylvania.

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Pennsylvania, at No. 29 of May Term, 1901, may be found the following words and figures, to-wit:

Docket Entries.

RUBEN L. RICE and JOS. C. ROBINSON, as Members of the Firm of Rice & Robinson, and Successors of the Firm of Rice, Robinson & Witherop,

vs.

WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, the Receiver Thereof; THE WESTERN NEW YORK & PENNSYLVANIA RAILWAY COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON & MAINE RAILROAD COMPANY.

Petition and Exhibits filed April 11, 1901. 1901, June 28, Order fixing date and place of trial filed. 1901, July 13, Præcipe for appearance of Patterson & Sterrett, Esqs., for Western New York and Pennsylvania Railroad Company filed. 1901, August 6, Trial postponed to November Term. 1901, September 10, Answer of Western New York and Pennsylvania Railroad Co. and Samuel G. De Coursey, the Receiver thereof, filed. 1901, September 10, Answer of Western New York and Pennsylvania Railroad Company filed. 1901, October 4, Præcipe for appearance of George A. Long, Esq., for Fitchburg Railroad Company filed. 1902, January 25, Answer of Fitchburg Railroad Company filed. 1902, April 18, it is ordered that the trial of this cause be fixed for the 19th day of May, 1902, and that the Marshal forthwith serve a copy of this order and the petition upon the defendants who have not appeared or answered, said service to be made within the District if the same can be done, if not, then whenever service can be obtained. April 23, 1902, at Boston,
8 Mass., served the within order and petition upon the Boston and Maine Railroad Co. by giving a true and attested copy of each to H. E. Fisher, Treasurer of said Company, at the office of said Company, and informing him of the contents thereof. So answers Stephen P. Stone, U. S. Marshal, W. D. of Penna. 1902, May 19, Answer of Boston and Maine Railroad filed. And now, May 26th, 1902, the parties to this cause being at issue a jury being called came, viz: Chas. G. McCleary, W. H. Gelbach, James F. Morris, W. M. Remaley, J. C. Bunting, Chas. E. Meals, Alexander Boyd, C. A. Cadwallader, Geo. W. Mackall, H. M. Misserall, Wm. McGarvey and M. A. Reed, twelve good and lawful men, who having been duly summoned and returned, were balloted for, impanneled and sworn to well and truly try this issue joined and a true verdict render according to the evidence, and the jury having heard the evidence, arguments and charge of the Court, after due deliberation, do say: "We find for the plaintiff in the sum of Seven hundred forty-one and 08/100 ($741.08) dollars."

1902, May 26th, points on behalf of each and all of the defendants filed. 1902, May 27th, motion, reasons and rule for new trial filed by leave of Court. 1903, February 12th, opinion of the Court over-

ruling motion for new trial and directing judgment to be entered upon the verdict filed. And, now, to wit, February 12th, 1903, judgment is hereby entered upon the verdict, in pursuance with the foregoing opinion. 1903, March 2d, plaintiff's bill of costs filed. 1903, March 2d, petition for appeal filed. 1903, March 2d, assignments of error filed. 1903, March 2d, bond *sur* writ of error filed. 1903, March 2d, bill of exceptions of Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, receiver thereof; the Western New York & Pennsylvania Railway Company, the Boston & Maine Railroad Company and the Fitchburg Railroad Company filed.

1903, March 4th, writ of error allowed and issued.

1903, March 4th, citation awarded, issued and served.

9 *Petition and Exhibit.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

No. —, — Term.

PENN REFINING COMPANY, LIMITED, a Limited Partnership Organized under and by Virtue of the Laws of the State of Pennsylvania, Plaintiffs,

vs.

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and SAMUEL DE COURSEY, the Receiver Thereof; THE WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, and THE LEHIGH VALLEY RAILROAD COMPANY, Defendants.

To the Honorables the Judges of the Circuit Court of the United States within and for the Western District of Pennsylvania:

Your petitioner, the Penn Refining Company, Limited, a limited partnership organized under and by virtue of the laws of the State of Pennsylvania, and a citizen thereof, whose principal place of business is at Oil City, in said district, humbly complaining, showeth:

I. That The Western New York and Pennsylvania Railroad Company is a corporation organized under the laws of New York and Pennsylvania, having its principal office at Philadelphia, Pennsylvania, and that Samuel G. De Coursey has been and still is receiver thereof; but, as your petitioner is informed and believes, and so states, the railroad properties heretofore owned by the said Western New York and Pennsylvania Railroad Company are now and

10 since on or about March 31, 1895, have been owned, controlled and operated by The Western New York and Pennsylvania Railway Company, a corporation organized under the laws of New York and Pennsylvania, having its principal office at Philadelphia, Pennsylvania; that The New York, Lake Erie and Western Railway Company is a corporation organized under the laws of New York, having its principal office in New York City, New York, and

that J. G. McCullough and E. B. Thomas have been and still are receivers thereof; but, as your petitioner is informed and believes, and so states, the railroad properties heretofore owned, controlled or operated by the said New York, Lake Erie and Western Railroad Company are now and since on or about November 20, 1895, have been owned, controlled and operated by The Erie Railroad Company, a corporation organized under the laws of New York, having its principal office at New York City, New York; that The Delaware and Hudson Canal Company is a corporation organized under the laws of New York, having its principal office at New York City, New York; that The Fitchburg Railroad Company is a corporation organized under the laws of Massachusetts, having its principal office at Boston, Massachusetts; that The Boston and Maine Railroad Company is a corporation organized under the laws of Massachusetts, having its principal office at Boston, Massachusetts; that The Lehigh Valley Railroad Company is a corporation organized under the laws of Pennsylvania, having its principal office at Philadelphia, Pennsylvania; that The Pennsylvania Railroad Company is a corporation organized under the laws of Pennsylvania, having its principal office at Philadelphia, Pennsylvania, and that each of the said above described corporations and persons was, on the third day of September, 1888, or has since become, a common carrier engaged in the transportation of passengers and property, wholly by railroad, alone or
11 together with some one or more of the said other defendants, between points in different States of the United States, and particularly from Titusville, Pennsylvania, and Oil City, Pennsylvania, and points in the vicinity of Titusville and Oil City, aforesaid, to Boston, in the State of Massachusetts, and other points in the States of Massachusetts, Connecticut, Rhode Island, Vermont, New Hampshire and Maine, and to New York City, New York, Perth Amboy, Hoboken, Jersey City, Communipaw, New Jersey, and other points on or near New York harbor, and known as New York harbor points, according as their several lines or routes may run, and that as such common carriers and in respect to such transportation they, the said defendants, have been and are subject to the provisions of the said "Act to regulate commerce" and the acts amendatory thereof and supplementary thereto.

II. That under and in pursuance of Section 13 of said Act to regulate commerce the Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, did jointly, on the fourth day of December, 1888, apply by petition to the Interstate Commerce Commission, a tribunal which was created and established and now exists under and by authority of an Act of Congress entitled "An Act to regulate commerce," approved February 4, 1887, as amended by Acts approved March 2, 1889, and February 10, 1891, and February 11, 1893, complaining therein to the said Interstate Commerce Commission against The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company, The Delaware and Hudson Canal Company, The Fitchburg Railroad Company and The Boston and Maine Railroad Company of certain

alleged violations by said defendants of provisions of said act to regulate commerce, as fully and specifically appears in and by a copy of said petition, marked "Exhibit A," and hereto annexed, and the same is hereby made a part of this petition; that under and in pursuance of Section 13 of said Act *of* to regulate commerce the said In-
12 dependent Refiners' Associations did jointly, on the same day, to-wit, the fourth day of December, 1888, apply by petition to the said Inter State Commerce Commission complaining therein against The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company and the Lehigh Valley Railroad Company of certain alleged violations by said defendants of provisions of said Act to regulate commerce, as fully and specifically appears in and by a copy of said petition, marked "Exhibit B" and hereto annexed, and the same is hereby made a part of this petition; that thereafterwards, to-wit on the thirtieth day of January, 1889, the said Independent Refiners' Association did under Section 13 of said Act to regulate commerce, jointly apply by petition to the said Interstate Commerce Commission, complaining therein against the Pennsylvania Railroad Company and the Western New York and Pennsylvania Railroad Company of certain alleged violations by said defendants of provisions of said Act to regulate commerce as fully and specifically appears in and by a copy of said petition, marked "Exhibit C," and hereto annexed, and the same is hereby made a part of this petition.

III. That thereupon and forthwith after the filing of said petitions, the said Interstate Commerce Commission did, as required by Section 13 of said Act to regulate commerce, forward to each of the defendants named in said petition, marked, "Exhibit A" hereto, a statement of the charges therein set forth, together with a notice to satisfy the complaint or to answer the same in writing within twenty days, and to each of the defendants named in said petition, marked "Exhibit B" hereto, a statement of the charges therein set forth, together with a notice to satisfy the complaint or to answer the same in writing within twenty days, and to each of the defendants named in said petition, marked "Exhibit C" hereto, a statement of the charges therein set forth, together with a notice to satisfy the com-
13 plaint or to answer the same in writing within twenty days; that thereafterwards answers to each of said petitions were severally filed with said Commission by the defendants therein named denying the alleged violations of said Act to regulate commerce, as set forth in said petitions, respectively "Exhibit- A, B and C" hereto; that thereafterwards the said cause being at issue on the pleadings and having been heard together by agreement of the parties, and duly submitted for determination by said Commission on the testimony and other evidence duly taken, presented, or filed in behalf of the respective parties, and the same having been investigated and duly considered by said Commission, it was made to appear to the satisfaction of said Commission that said defendants had violated provisions of said Act to regulate commerce in certain respects as alleged in said petitions "Exhibits A, B and C" hereto, and accordingly on the fourteenth day of November, 1892, the said Commission

so adjudged and made a report in writing in respect thereto, setting forth therein the conclusions arrived at by the Commission in said cause and the findings of fact upon which said conclusions were based. A copy of said report, marked "Exhibit D" is hereto annexed and hereby made a part of the petition.

IV. That on the day of the making of the report referred to in Paragraph III hereof, to-wit, the fourteenth day of November, 1892, the same Commission made and entered an order or notice to The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company, The Delaware and Hudson Canal Company, The Fitchburg Railroad Company, The Boston and Maine Railroad Company, The Lehigh Valley Railroad Company, and the Pennsylvania Railroad Company, requiring defendants, among other things, to, "wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their re-
14 spective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points or to Boston and Boston points, or on reasonable notice promptly to furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct, and that on or before the ninth day of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges, pursuant to the provisions of Section 6 of the Act to regulate commerce, and also file copies of said tariffs with this Commission, as required by the provisions of said section;" and it was further directed and required in and by said order or notice that the rate on shipments of oil, both in tanks and in barrels, over th- -ads of said defendants should be the same, and that said defendants should "refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package on shipments of oil in barrels when the use of tank cars has not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use, and, inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary;" all of which appears in and by said order or notice, a full copy of which, marked "Exhibit E," is hereto annexed and is hereby made a part hereof.

V. That afterwards, to-wit, on the ninth day of December, 1892, the said Commission caused a copy of said report, "Exhibit D" hereto, and of said order or notice, "Exhibit E" hereto, to be delivered to each and all of the parties defendant in said causes.

15 VI. That the respondents, to wit, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof; the Western New York & Pennsylvania Railway Company and the Lehigh Valley Railroad Company, did

willfully fail and neglect to obey and conform to the requirements of the said order and notice of November 14th, 1892, "Exhibit E" hereto, and especially did they willfully fail and neglect, and have willfully failed and neglected to obey and conform to the requirements of said order and notice commanding the respondents herein and the other defendants in said cause instituted before said commission by the petitions "Exhibits A, B and C" hereto, to "refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand therefor by such parties, all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels, when the use of tank cars has not been open to shippers impartially and the shipper claiming reparation has been deprived of their use," and that such failure and neglect has continued during all the time since the issuance of said order or notice, "Exhibit E" hereto.

VII. That in consequence of the failure and neglect of the respondents and of the other defendants in said causes and of said receivers of the Western New York & Pennsylvania Railroad Company and the New York, Lake Erie and Western Railroad Company to obey and conform to the above mentioned requirements of said order or notice, "Exhibit E" hereto, certain shippers of petroleum oil over the lines operated by parties defendant herein did, at various dates subsequent to the issuance of said order or notice and pursuant to the clause in said order or notice continuing said causes or proceedings for such further action or inquiry by said commission in regard to the amount of reparation due to injured parties as might become necessary, file with said commission various claims
16 for reparation under said order or notice, "Exhibit E" hereto, and thereupon the said commission did, on the tenth day of April, 1894, prepare a notice embodying the said claims for reparation then on file and stating therein that each of the hereinbefore mentioned causes were assigned for a hearing before the said commission at Titusville, Pa., on the fifteenth day of May, 1894, at 10 o'clock A. M. of that day, for the purpose of determining what reparation is or may be due from the defendants or any of them to the claimants in said notice mentioned or other parties entitled thereto under said order of the commission of November 14, 1892, "Exhibit E" hereto; and thereafterwards, to wit, on the fourteenth day of April, 1894, the said commission duly caused a copy of said notice to be delivered to each of the defendants in said causes and to S. G. De Coursey, receiver of the Western New York & Pennsylvania Railroad Company, who had been appointed as such receiver on or about the first day of April, 1893, and to John King and J. G. McCullough, receivers of The New York, Lake Erie & Western Railroad Company, who had been appointed as such receivers on or about the twenty-fifth day of July, 1893, and which said John King was succeeded as such receiver or co-receiver by the defendant, E. B. Thomas, on or about the first day of May, 1895; and, by order entered by said Commission on the tenth day of April, 1894, and duly caused to be delivered to the parties on April 14, 1894. That on said fifteenth day of May, 1894, the defendants in said causes and the defendants, the

receivers of The Western New York and Pennsylvania Railroad Company and The New York, Lake Erie and Western Railroad Company, did appear before the said Commission at Titusville aforesaid, and the said matter of reparation duly proceeded to hearing and investigation, and further or supplementary hearing was also had as allowed by the said order of April 10, 1894, last above mentioned.

17 VIII. That thereafterwards, to-wit, on the twenty-second day of October, 1895, and after full investigation of the matters involved, the said Commission did make and file further or supplementary report and opinion and orders in said causes, a copy whereof, marked "Exhibit H," is hereto annexed and is hereby made a part of this petition; that in and by said further or supplementary report and opinion and orders it was found, decided, required, and ordered that certain parties, claimants therein named, members of the complaining associations in said causes, to wit Penn Refining Company, Limited, Oil City, Pa.; John Schwartz & Co., Titusville, Pa.; Rice & Robinson, Titusville, Pa.; Rice, Robinson & Foggan, Titusville, Pa.; Independent Refining Company, Limited, Oil City, Pa.; Genie Wood, doing business under the trade name of the Oil Creek Refining Works, Titusville, Pa.; American Oil Works, Limited, Titusville, Pa.; Western Refining Company, Limited, Titusville, Pa.; S. Y. Ramage, doing business under the trade name of the Mutual Oil Company, Reno, Pa.; National Oil Company, Limited, Titusville, Pa.; Continental Refining Company, Limited, Oil City, Pa.; International Oil Works, Limited, Titusville, Pa.; and A. L. Confer, doing business under the trade name of The Empire Oil Works, Reno, Pa.; were entitled to recover from and should be by the defendants, The Western New York and Pennsylvania Railroad Company, S. G. De Coursey, receiver of The Western New York and Pennsylvania Railroad Company; The New York, Lake Erie and Western Railroad Company, J. G. McCullough and E. B. Thomas, receivers of The New York, Lake Erie and Western Railroad Company; The Delaware and Hudson Canal Company; The Fitchburg Railroad Company, the Boston and Maine Railroad Company, and the Lehigh Valley Railroad Company various specified sums as reparation for damages resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels between stated points, during a

18 period of time mentioned, and the amount or amounts due to each claimant, the particular defendants who should pay the said amount or amounts so found due, and the reason why the said defendants should make such reparation to said claimants, including the violations found and set forth in "Exhibit D" hereto, and the continuance of such violations, and the disobedience of said order or notice of November 14, 1892, "Exhibit E" hereto, are in said reports, opinions and orders, "Exhibit H" hereto, fully set forth; the said commission did, on the 11th day of November, 1895, cause a copy of said reports and opinions and orders to be delivered to each of said defendants and claimants and to each and all of the parties to said causes.

IX. That the liability and duty of the Western New York and

Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver of said railroad company, to make reparation to the plaintiffs, as required by said order and notice, "Exhibit E," and as shown by said report, opinion and order, "Exhibit H," was assumed by and is binding upon its successor, the Western New York and Pennsylvania Railway Company.

X. That the defendants, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof, and the Western New York and Pennsylvania Railway Company and the Lehigh Valley Railroad Company have failed, neglected and refused and still continue to neglect and refuse to make to your petitioners reparation as required by said order and notice, "Exhibit E," and as shown by said report, opinion and order, "Exhibit H," to-wit, the sum of $8,579, with interest thereon from May 15, 1894, being the amount claimed by plaintiff from defendants in this action.

XI. That the defendants, to wit, the Western New York and Pennsylvania Railroad Company, Samuel G. De Coursey, the Receiver thereof, and the Lehigh Valley Railroad Company, during
19 the period covered by the part of the said report, opinion and order, "Exhibit H" commanding the said defendants to make reparation to the plaintiffs as therein specified, formed and constituted a through line or route as common carrier doing business under a common control, management or arrangement for a continuous carriage or shipment, engaging *inter alia*, in the transportation of petroleum oil and its products from the points in the State of Pennsylvania to the points in other State or States, mentioned in "Exhibit H" in connection with the sum ordered to be paid to the plaintiffs as reparation. And the said defendants did demand, exact and receive a gross sum, as a joint freight charge by said defendants for such transportation; and that the said sum which the said defendants were commanded in and by said report, opinion and order, "Exhibit H," to pay to the plaintiff herein was so ordered to be paid as reparation for damages resulting to the said plaintiffs from excessive and unlawful transportation charges so demanded, exacted and received from plaintiffs by defendants jointly upon shipments of petroleum oil in barrels between the points stated during the period of time in said order mentioned.

Wherefore, the said Penn Refining Company, Limited, do respectfully pray:

1st. That this Honorable Court will, by its order, fix a time and place for the trial of this cause in accordance with said Act to regulate commerce.

2nd. That this Honorable Court will hear, determine and adjudicate the matters involved in this cause herein above and the said exhibits hereto attached set forth.

3rd. That the Court may make such other order or orders in the premises as may be meet and proper.

PENN REFINING COMPANY, LIMITED,
By M. J. HEYWANG,
S. S. MEHARD,
LEE & CHAPMAN, *Its Attorneys.*

20 "EXHIBIT A."

Before the Interstate Commerce Commission.

No. 153.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PENNSYLVANIA, and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA, Complainants,

against

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY; NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY; DELAWARE AND HUDSON CANAL COMPANY; FITCHBURG RAILROAD COMPANY, and BOSTON AND MAINE RAILROAD COMPANY, Defendants.

To the Honorable the Interstate Commerce Commission:

1. The complainants and petitioners allege that they are associations composed of about sixteen separate and distinct petroleum refining companies organized for the purpose, among other things, of obtaining from railroad and transportation companies lawful, equal, reasonable and just rates of freight upon refined petroleum and products of petroleum manufactured and sold by the members of said associations at and from works owned and operated by them respectively, in the oil regions of Pennsylvania, at or near the cities of Titusville, Crawford County, and Oil City, Venango County, in said State of Pennsylvania; and they further aver that in the lawful pursuit of their business as refiners and sellers of petroleum products your petitioners ship and for several years heretofore have shipped from their works in Pennsylvania over the railroads of respondents large quantities of petroleum to Boston, in the State of Massachusetts, and to intermediate points, and to Portland, Maine, and various points in the New England States, for sale in the markets of said places. The past year's total shipments from their works by members of said associations, who manufacture and sell in competition with themselves as well as with other persons, firms and corporations engaged in the same business, was about 900,000 barrels, and the aggregate daily capacity of the works owned by members of said associations is about 5,500 barrels of crude petroleum per day.

21

II. The respondent, The Western New York and Pennsylvania Railroad Company is a corporation chartered by the States of Pennsylvania and New York, owning and operating, *inter alia*, a line of railway transportation from Oil City and Titusville, in the State of Pennsylvania, to the City of Buffalo, in the State of New York; The New York, Lake Erie and Western Railroad Company is a corporation chartered by the States of New York and New Jersey, owning and operating a line of railway through the States of New York, Pennsylvania and New Jersey; The Delaware and Hudson Canal Company is a corporation chartered by the State

POOR C

of New York, owning and operating a line of railway partly through the States of New York and Vermont; The Fitchburg Railroad Company is a corporation chartered by the State of Massachusetts, and owning and operating a line of railway, *inter alia*, from Troy, in the State of New York, to Boston, in the State of Massachusetts; The Boston and Maine Railroad Company is a corporation chartered by the State of Massachusetts, owning and operating a line of railway from Boston and other points in the State of Massachusetts to Portland and other points in the States of Maine and
22 New Hampshire, and each of said companies is a common carrier, engaged in interstate transportation.

The said five railroad companies connect with each other, and by and under contracts between themselves and various traffic arrangements form and operate a continuous through route for the transportation of petroleum products from the oil refineries of your petitioners, situated as aforesaid, through or partly through the States of Pennsylvania, New York, Massachusetts and Maine, as well as other New England states, and carloads of oil are billed through from Titusville and Oil City at through joint rates of freight, divided among said respondent companies, under traffic contracts between themselves.

III. The respondents have established and published a schedule of joint through rates and charges which are now in force, for the transportation of the manufactured products of petroleum in barrels in carload lots upon their said railroads from Oil City and Titusville aforesaid to Boston, in the State of Massachusetts, and other points in the New England states on the line of the said Fitchburg Railroad Company and the said Boston and Maine Railroad Company, called Boston points, by which respondents charge, collect and receive twenty-five cents per hundred pounds, making the rate per barrel one dollar, the weight of the package being included and charged for therein.

Your petitioners aver that the said rates and charges for said service are excessive, unjust, and unreasonable, and are in violation of the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to regulate commerce."

IV. The said rates and charges established by respondents as aforesaid and demanded and collected by them subject your petitioners and their said traffic and the said localities to which their petroleum products are carried as aforesaid to an undue and unreasonable prejudice and disadvantage, because, among other
23 things, the rates and charges for said service are practically prohibitory upon the traffic of petitioners to said localities, and under average circumstances and conditions sufficient to nearly absorb the profit of petitioners in their trade to said localities, and under conditions as they exist during some periods of each year and under competition, will entirely absorb and destroy all profit in the business of petitioners to said localities, and if continued will compel them to abandon their trade in that region of country. In addition to the injury to petitioners, the respondents will be deprived

of a large amount of traffic, and the localities mentioned will be deprived of the benefit of the competition which the business of petitioners afford them.

With just and reasonable rates for transportation, petitioners' traffic to said localities over the respondents' roads would in the past have been much greater and in the future would be much greater than it has been.

V. Your petitioners further aver that said respondents in making said rates and charges and demanding and collecting the same for the said service subject your petitioners and their said traffic and the said localities to which petroleum products are carried as aforesaid to an undue and unreasonable prejudice and disadvantage, because among other things, the same are disproportionate as compared with the rates for the like service in the like traffic under substantially similiar circumstances and conditions from Titusville and Oil City aforesaid to New York and New York points, which rate is now sixty-six cents. Previous to September 13, 1888, said rate to New York City and New York City points was fifty-two cents, but on or about that date was wrongfully raised to sixty-six cents. The difference in charge on petitioners' traffic destined to said points, respectively, is over fifty per cent.; the just difference in charge should not exceed ten to twenty per cent., and, as petitioners are informed and believe, no greater difference than this (10 to 20 per cent.) is made
24 by respondents in the transportation of other merchandise from the West to Boston points.

There is competition in said traffic by ocean transportation from New York City to Boston points. Any unjust or unreasonable difference in rates to said points as compared with New York points is injurious to petitioners' business—discriminates against their traffic and said Boston points.

VI. The first two named carriers join in both the Boston and Boston points and New York and New York points joint through rates. As to them the service which they perform in petitioners' traffic for each destination is a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similiar circumstances and conditions. They demand, charge, and collect, as petitioners believe, more in proportion for the same service when the petroleum products are destined for Boston and Boston points than when destined for New York, etc., whereby they unjustly and unlawfully discriminate against the first named localities and the said traffic destined for such localities.

VII. And your petitioners further complain and say that the said respondents on September 3, 1888, established and published a schedule of joint through rates and charges for the transportation of the manufactured products of petroleum in barrels in car-load lots upon their said railroads from Oil City and Titusville aforesaid to Manchester, in the State of New Hampshire; Salem, in the State of Massachusetts; Portland, in the State of Maine, and about one hundred and fifty other points in the said States reached by the said Boston and Maine Railroad Company, by which respondents charged

and collected for said service 25 cents per hundred pounds or $1 per barrel.

By notice dated October 25, 1888, said rates for the said points were abrogated and withdrawn, to take effect November 6, 1888.
25 Said notice was not communicated to your petitioners until November 2, 1888, and public notice was not given thereof until said date of November 2, 1888, and the same was not posted or exhibited for public inspection until said last-named date in the depots or stations of the initial road, the Western New York and Pennsylvania Railroad Company. Respondents have not established and published any rates for said service to said points and refuse to state what their charge for the same will be, although often requested by petitioners so to do. While respondents do not refuse to carry petitioners' traffic for said points, yet they will not state what the charges will be, and give petitioners to understand that an arbitrary addition will be made to the rates established September 3, 1888, which were themselves unreasonably high, excessive and unjust. Because of these things petitioners are unable to ship their products to said points, by reason of which the said respondents have and do violate the provisions of the said Act to regulate commerce.

VIII. And your petitioners further charge that they are subjected to undue and unreasonable prejudice and disadvantage in relation to their business and traffic over the railways of the respondents, and undue and unreasonable preference and advantage are given to their competitors in business by said respondent companies relative to the traffic and transportation of refined petroleum over their lines of transportation as aforesaid, to-wit, to an organization known as the Standard Oil Trust, which is formed by a combination of numerous firms, associations and corporations engaged in the business of refining, buying and selling petroleum and its products for home trade and for export, and is also engaged in the business of storing crude petroleum in iron tanks, gathering the same from wells in the oil region of Pennsylvania, and transporting the same as a common carrier by means of pipe lines to the seaboard, at or near Philadelphia, in Pennsylvania; Baltimore in Maryland; New York, in the
26 State of New York, and to Buffalo, in New York and Cleveland, in Ohio, the charge to the seaboard for transportation through said pipe lines being the same as that made by the railroad companies known as the trunk lines.

Your petitioners are informed and believe, and so charge that the said respondent companies, either directly or indirectly, act under contracts, agreements and arrangements made by the said Standard Oil Trust or some of the pipe line common carrier companies allied with said Standard Oil Trust, and forming part of it, to-wit, the National Transit Company, with other common carriers by rail engaged in the interstate transportation of petroleum for the pooling or division of freights of different and competing common carriers, and for dividing between them some part of the net proceeds of the earnings of said common carriers from petroleum interstate traffic or of said traffic in specie, by means of which such net earnings are

divided in violation of Section 5 of the Act of Congress, approved February 4, 1887, entitled "An act to regulate commerce."

And your petitioners charge that under said pooling contracts or agreements made between said trunk lines and said Standard Oil Trust or its National Transit Company the rates charged by said respondent companies for transportation of petroleum from Oil City and Titusville, in the State of Pennsylvania, and herein complained of are fixed by said combination, and all connecting roads, including the initial railroad, the Western New York and Pennsylvania, which your petitioners must use, and from which they must obtain, and do obtain their rate of through freight to the localities as aforesaid, are obliged to accept and charge the rate so fixed, and that said rate is made in the interest of the said Standard Oil Trust and its allied companies, who are competitors of your petitioners in the business of refining, and for the purpose of maintaining the said division of oil freights or earnings among the members of said combination
27 or pool, and of maintaining an excessive and unreasonably high rate of freight, and also with the intent of giving to the said Standard Oil Trust an advantage over your petitioners in the manufacture, transportation and sale of their products.

IX. Petitioners aver that all the acts of the respondents herein complained of are violations of the provisions of the said Act of Congress entitled "An Act to regulate commerce."

Wherefore your petitioners pray:

First. That the commission will order an investigation of the charges herein made and will make such orders as to the production of documents, contracts, agreements, freight schedules and vouchers, and the taking of such testimony at such times and places as may be necessary to enable your petitioners and the commission to establish the truth of the allegations herein made.

Second. That the commission will of its own motion institute all further inquiries and proceedings that it may deem necessary, proper or expedient, not herein specifically prayed for or which may be omitted by petitioners in the course of proceedings, and give its aid in the examination of witnesses and production of documents, that the whole truth bearing on the matter in controversy may, as far as possible, be brought out and made plain.

Third. That the commission will order and direct the said respondents, the Western New York & Pennsylvania Railroad Company, the New York, Lake Erie & Western Railroad Company, the Delaware & Hudson Canal Company, the Fitchburg Railroad Company and the Boston & Maine Railroad Company, to desist from and cease the unlawful acts complained of herein.

Fourth. That after a full investigation of the matters complained of, or in controversy, the commission will order the said respondents to adopt such rates and charges for the services mentioned as the commission shall find to be just and reasonable, and, further, that
28 the said respondents be ordered and directed to make such reparation to petitioners for the injuries that the commission shall find to have been done them by respondents as shall be just and proper.

Fifth. That the commission will make such other findings and orders as may be lawful and just.

And they will ever pray, etc.

INDEPENDENT REFINERS' ASSOCIATION
OF TITUSVILLE, PA.,
By JOHN W. WITHEROP, *President.*
INDEPENDENT REFINERS' ASSOCIATION
OF OIL CITY, PA.,
Per ALVIN D. DEMING, *President.*

M. J. HEYWANG,
Of Counsel for Complainants.

STATE OF PENNSYLVANIA,
Western District of Pennsylvania, County of Crawford, ss:

John W. Witherop, being duly sworn according to law, doth depose and say that he is a member of the Independent Refiners' Association of Titusville, Pa., and the president thereof, and that the said association is one of the petitioners and claimants above named; that the statements of facts made in the foregoing petition and complaint are true so far as made from the knowledge of petitioners, and so far as made upon belief, or information and belief, he verily believes the same to be true.

JOHN W. WITHEROP.

Sworn and subscribed before me this first day of December, 1888.

[SEAL.] GEORGE A. CHASE,
United States Circuit Court Commissioner in and for the Western District of Pennsylvania.

29 STATE OF PENNSYLVANIA, *County of Venango, ss:*

Alvin D. Deming, being duly sworn according to law, doth depose and say that he is a member of the Independent Refiners' Association of Oil City, Pa., and the president thereof, and that the said association is one of the petitioners and complainants above named; that the statements of facts made in the foregoing petition and complaint are true so far as made from the knowledge of petitioners, and so far as made upon belief, or information and belief, he verily believes the same to be true.

ALVIN D. DEMING.

Sworn and subscribed before me this first day of December, 1888.

[SEAL.] MARTIN CAREY,
Notary Public.

(Endorsed:) Filed December 4, 1888.

E. A. M., *Secretary.*

30 "EXHIBIT B."

Before the Interstate Commerce Commission.

No. 154.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PENNSYLVANIA, and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA, Complainants,

against

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY; NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, and LEHIGH VALLEY RAILROAD COMPANY, Respondents.

To the Honorable the Interstate Commerce Commission:

1. The complainants and petitioners allege that they are associations composed of about sixteen separate and distinct petroleum refining companies, organized for the purpose, among other things, of obtaining from railroad and transportation companies lawful, equal, reasonable, and just rates of freight upon refined petroleum and products of petroleum manufactured and sold by the members of said associations at and from works owned and operated by them respectively in the oil regions of Pennsylvania, at or near the cities of Titusville, Crawford county, and Oil City, Venango county, in said State of Pennsylvania; and they further aver that in the lawful pursuit of their business as refiners and sellers of petroleum products your petitioners ship and for several years heretofore have shipped from their works in Pennsylvania over the railroads of respondents large quantities of petroleum products to the Atlantic sea-
31 board, at or near Perth Amboy, in the State of New Jersey, mainly for export. Said Perth Amboy is commercially a New York harbor point. The past year's *total shipments* to all points from their works by members of said associations, who manufacture and sell in competition with themselves as well as with other persons, firms, and corporations engaged in the same business, was about 900,000 barrels, and the aggregate daily capacity of the works owned by members of said associations is about 5,500 barrels of crude petroleum per day.

II. The respondent, The Western New York and Pennsylvania Railroad Company, is a corporation chartered by the States of Pennsylvania and New York, owning and operating, *inter alia*, a line of railway transportation from Oil City and Titusville, in the State of Pennsylvania, to the city of Buffalo, in the State of New York. The New York, Lake Erie and Western Railroad Company is a corporation chartered by the States of New York and New Jersey, owning and operating a line of railway through the States of New York, Pennsylvania and New Jersey. The Lehigh Valley Railroad Company is a corporation chartered by the States of Pennsylvania and New York, and owning and operating a line of railway transportation

in and through the States of New York, Pennsylvania, and New Jersey, and each of said companies is a common carrier, engaged in interstate transportation.

The said three railroad companies connect with each other, and by and under contracts between themselves, and various traffic arrangements, form and operate a continuous through route for the transportation of petroleum products from the oil refineries of your petitioners, situated as aforesaid, through or partly through the States of Pennsylvania, New York, and New Jersey; and carloads of oil are billed through from Titusville and Oil City at through joint rates of freight, divided among said respondent companies, under traffic contracts between themselves.

32 III. The respondents have established and published a schedule of joint through rates and charges, which are now in force, for the transportation of the manufactured products of petroleum in barrels in carload lots upon their said railroads from Oil City and Titusville aforesaid to Perth Amboy, aforesaid; by which respondents charge, collect, and receive sixteen and one-half cents per hundred pounds, making the rate per barrel sixty-six cents, the weight of the package being included and charged for therein.

Your petitioners aver that the said rates and charges for said service are excessive, unjust, and unreasonable, and are in violation of the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to regulate commerce."

IV. The said rates and charges established by respondents as aforesaid and demanded and collected by them subject your petitioners and their said traffic to an undue and unreasonable prejudice and disadvantage because, among other things, the rates and charges for said service are practically prohibitory upon the traffic of petitioners to New York harbor localities, and under average circumstances and conditions sufficient to nearly absorb the profit of petitioners in their trade to said localities, and, under conditions as they exist during some periods of each year and under competition, will entirely absorb and destroy all profit in the business of petitioners to said localities and if continued will compel them to abandon their trade at New York harbor, and may compel them to close their factories. The greater portion of the petroleum products shipped by petitioners to New York harbor points, as aforesaid, is a very low-priced refined oil, designed for export, and which has no other market. In addition to the injury to petitioners the respondents will be deprived of a large amount of traffic.

V. And your petitioners further charge that they are subjected to undue and unreasonable prejudice and disadvantage in rela-

33 tion to their business and traffic over the railways of the respondents, and undue and unreasonable preference and advantage is given to their competitors in business by the said respondent companies relative to the traffic and transportation of refined petroleum over their lines of transportation as aforesaid, to wit, to an organization known as the Standard Oil Trust, which is formed by a combination of numerous firms, associations, and corporations

engaged in the business of refining, buying and selling petroleum and its products for home trade and for export, and is also engaged in the business of storing crude petroleum in iron tanks, gathering the same from wells in the oil region of Pennsylvania, and transporting the same as a common carrier by means of pipe lines to the seaboard, at or near Philadelphia, in Pennsylvania; Baltimore, in Maryland; New York, in the State of New York, and to Buffalo, in New York, and Cleveland, in Ohio, the charge to the seaboard for transportation through said pipe lines being the same as that made by the railroad companies known as the trunk lines.

Your petitioners are informed and believe, and so charge, that the said respondent companies, either directly or indirectly, act under contracts, agreements and arrangements made by the said Standard Oil Trust or some of the pipe line common carrier companies allied with said Standard Oil Trust and forming part of it, to-wit, the National Transit Company, with other common carriers by rail engaged in interstate transportation of petroleum for the pooling or div sion of freights of different and competing common carriers, and for dividing between them some part of the net proceeds of the earnings of said common carriers from petroleum interstate traffic or of said traffic in specie, by means of which such net earnings are divided, in violation of Section 5 of the Act of Congress approved February 4, 1887, entitled "An Act to regulate commerce."

34 And your petitioners charge that under said pooling contracts or agreements made between said trunk lines and said Standard Oil Trust or its National Transit Company the rates charged by said respondent companies for transportation of petroleum from Oil City and Titusville, in the State of Pennsylvania and herein complained of are fixed by said combination, and all connecting roads, including the initial railroad, the Western New York and Pennsylvania, which your petitioners must use and from which they must obtain and do obtain their rate of through freight to the localities as aforesaid, are obliged to accept and charge the rate so fixed, and that said rate is made in the interest of the said Standard Oil Trust and its allied companies, who are competitors of your petitioners in the business of refining, and for the purpose of maintaining the said division of oil freights or earnings among the members of said combination or pool and of maintaining an excessive and unreasonable hig' rate of freight, and also with the intent of giving to the said Sta dard Oil Trust an advantage over your petitioners in the manufacture, transportation and sale of their products.

VI. Petitioners aver that all the acts of the respondents herein complained of are in violation of the provisions of the said Act of Congress entitled "An Act to regulate commerce."

Wherefore your petitioners pray:

First. That Commission will order an investigation of the charges herein made and will make such orders as to the production of documents, contracts, agreements, freight schedules and vouchers, and the taking of such testimony and at such times and

place as may be necessary to enable your petitioners and the Commission to establish the truth of the allegations herein made.

Second. That the Commission will of its own motion institute all further inquiries and proceedings that it may deem necessary, proper or expedient, not herein specifically prayed for or
35 which may be omitted by petitioners in the course of proceedings, and give its aid in the examination of witnesses and production of documents, that the whole truth bearing on the matter in controversy may, as far as possible be brought out and made plain.

Third. That the Commission will order and direct the said respondents, The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company, and The Lehigh Valley Railroad Company to desist from and cease the unlawful acts complained of herein.

Fourth. That after a full investigation of the matters complained of or in controversy, the Commission will order the said respondents to adopt such rates and charges for the services mentioned as the Commission shall find to be just and reasonable, and, further, that the said respondents be ordered and directed to make such preparation to petitioners for the injuries that the Commission shall find to have been done them by respondents as shall be just and proper.

Fifth. That the Commission will make such other findings and orders as may be lawful and just.

And they will ever pray, etc.

INDEPENDENT REFINERS' ASSOCIATION
OF TITUSVILLE, PENNA.,
By JOHN WITHEROP, *President.*
INDEPENDENT REFINERS' ASSOCIATION
OF OIL CITY, PENNA.,
Per ALVIN D. DEMING, *President.*

M. J. HEYWANG,
Of Counsel for Complainants.

36 STATE OF PENNSYLVANIA,
Western District of Pennsylvania, County of Crawford, ss:

John W. Witherop, being duly sworn according to law, doth depose and say that he is a member of the Independent Refiners' Association of Titusville, Pa., and the President thereof, and that the *sale* association is one of the petitioners and complainants above named; that the statements of facts made in the foregoing petition and complaint are true so far as made from the knowledge of petitioners, and so far as made upon belief, or information and belief, he verily believes the same to be true.

JOHN W. WITHEROP.

Sworn to and subscribed before me this first day of December, 1888.

[SEAL.] GEORGE A. CHASE,
United States Circuit Court Commissioner
in and for the Western District of Pennsylvania.

STATE OF PENNSYLVANIA, *County of Venango, ss:*

Alvin D. Deming, being duly sworn according to law, doth depose and say that he is a member of the Independent Refiners' Association of Oil City, Pa., and the president thereof, and that the said association is one of the petitioners and complainants above named; that the statements of facts made in the foregoing petition and complaint are true so far as made from the knowledge of petitioners, and so far as made upon belief, or information and belief, he verily believes the same to be true.

ALVIN D. DEMING.

Sworn and subscribed before me this first day of December, 1888.
[SEAL.] MARTIN CAREY,
Notary Public.

(Endorsed:) Filed Dec. 4, 1888. E. A. M., Sec'y.

37 "EXHIBIT C."

Before the Interstate Commerce Commission.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, Petitioners and Complainants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY and THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

First. The petition of the Independent Refiners' Association of Titusville, in the State of Pennsylvania, and the Independent Refiners' Association of Oil City, in the same State, respectfully represents that the petitioners' associations are respectively formed of persons, firms, and corporations engaged in the refining of petroleum in the oil regions of Pennsylvania in competition with various persons, firms, corporations, and associations engaged in the same business and affiliated to an association called the Standard Oil Trust.

Second. That the Pennsylvania Railroad Company is a railway corporation chartered by the Commonwealth of Pennsylvania and engaged as a common carrier of interstate traffic over its own lines of railroad and over other lines of railroad owned, leased, controlled, or operated by it in the States of Pennsylvania and New Jersey, and is a common carrier of crude and refined petroleum and its products as interstate traffic by railroad from the aforesaid oil regions of Pennsylvania to tidewater in New York harbor, in the State
38 of New Jersey, and the Western New York and Pennsylvania Railroad Company is a railroad corporation and common carrier whose lines extend from Oil City and Titusville, in the State of Pennsylvania, to points of connection at Irvineton and Corry, Pennsylvania, respectively, on the Pennsylvania Railroad system, and connect the aforesaid oil regions with the lines of the Pennsyl-

vania Railroad Company, and over which connecting lines of the said The Western New York and Pennsylvania Railroad Company petroleum and its products hereafter mentioned pass as interstate traffic, under through bills of lading, to the lines of the said Pennsylvania Railroad Company aforesaid, from whence the said petroleum and its products are moved by the said Pennsylvania Railroad Company as interstate traffic to their destination at tidewater in New York harbor, in the State of New Jersey.

Third. That the members of the petitioners' associations and also other refiners of petroleum are now, and have been for some time, shippers of petroleum and its products as interstate traffic over the lines owned, leased, operated, and controlled by the Pennsylvania Railroad Company and over the Western New York and Pennsylvania Railroad aforesaid from the oil regions of Pennsylvania to Tidewater of New York bay, in the State of New Jersey aforesaid, and that various persons, firms, corporations, and associations affiliated to the Standard Oil Trust are now, and have been for some time, shippers of petroleum and its products as interstate traffic over the said lines and by the said Pennsylvania Railroad Companies as common carriers aforesaid between the same points; that of the petroleum so shipped as aforesaid some is shipped in tank cars in bulk and some is shipped in wooden barrels, loaded on gondola, box, cattle, or other cars; that the shippers affiliated to the petitioners ship principally in wooden barrels and the shippers affiliated to the Standard Oil Trust ship principally in bulk in tank cars.

39 Fourth. That a corporation known as the National Transit Company, originally controlled by or affiliated to the Standard Oil Company and now controlled by the Standard Oil Trust, are the owners of a pipe line or pipe lines from the said oil regions of Pennsylvania to Tidewater in New York bay aforesaid, and have been for some time, engaged in the transportation of oil by means of said pipe line or pipe lines, and that resulting from the construction of said pipe line or pipe lines and in consequence of the low cost of transporting oil therein the refining business of the several persons, firms, corporations, and associations now affiliated to the said Standard Oil Trust has increased and become very remunerative and prosperous at the Atlantic seaboard.

Fifth. That within the last few years, and partly due to the concentration of the refining business by those affiliated to the Standard Oil Trust at the Atlantic seaboard, there has grown into existence a large refining business in the oil regions of Pennsylvania, now principally owned and controlled by the various persons, firms, associations, and individuals forming the two several associations, petitioners; that, in consequence of an advantage possessed by these refiners over the seaboard refiners for the local and domestic markets of their vicinity and of the West, the said independent refiners have been enabled to maintain and increase their business, notwithstanding the disadvantage to which they have been subjected on tidewater shipments by reason of the charges for transportation to tidewater hereinafter mentioned.

Sixth. That in the business of refining petroleum there is about

forty per cent. of the product which cannot readily be sold in the United States and for which the only good market that exists is the foreign market, or export trade, and that all such oil produced by the members of the associations' petitioners for the said foreign market or export trade must be shipped from the oil regions
40 aforesaid to the Atlantic seaboard for transhipment, and that without command of the export trade or foreign market the business of refining petroleum cannot be carried on at any profit.

Seventh. That the said National Transit Company is a common carrier of oil from the oil regions aforesaid to the bay of New York, and that after its entrance into business as a transporter of oil by pipe lines aforesaid and for the purpose of enabling it to change and maintain a high price for the transportation of oil as a common carrier, so as to secure large profits and maintain an advantage for the said Standard Oil Company and its affiliated industries, now controlled by the Standard Oil Trust aforesaid, over all competitors, it entered into a contract with the said Pennsylvania Railroad Company for the pooling or division of the traffic on oil between the said railroad company and the said, The National Transit Company, one consideration of which contract was the maintenance of the same rates on oil by the railroad and by pipe line, and that under and by virtue of said contract the said National Transit Company guarantees to the Pennsylvania Railroad Company twenty-six per cent. of the entire oil traffic from the oil regions aforesaid to tidewater, and that since the making of such contract the said Pennsylvania Railroad Company and the said National Transit Company have made, kept and maintained the same rate of charges for the transportation of oil from the oil regions aforesaid to tidewater at New York bay.

Eighth. That for some years and until the advance of rates on barreled oil hereinafter mentioned the said rate was fifty-two cents per barrel from the oil regions to New York bay, and the said Pennsylvania Railroad Company during said time, in common with the said Western New York and Pennsylvania Railroad Company or its predecessor corporation, have charged this rate per barrel, irrespective of whether the oil was shipped in bulk by tank cars or in wooden barrel packages; and the various firms, persons,
41 associations, and individuals forming the association, petitioners have been enabled by their advantages in the local markets to keep up, maintain, and even increase their business, notwithstanding the great disadvantages they were put to in their foreign trade in competition with their competitors and rivals affiliated to the said Standard Oil Trust aforesaid.

Ninth. That the said rate of fifty-two cents per barrel from the oil regions to tidewater, common to both railroad and pipe line as aforesaid, the disadvantage to which those affiliated to your petitioners would be placed for the export trade aforesaid as against those affiliated to the Standard Oil Trust aforesaid would, so far as your petitioners are able to ascertain, be about forty-eight cents per barrel as shown by the following table, viz:

Paid by Those Affiliated to Petitioners.

	Per barrel.
Local pipeage and collection	20 cents.
Railroad or pipe line charges to New York bay	52 "
Total	72 cents.
Deduct, to equalize barrel rates of 42 and 50 gallons, respectively	8 cents.
	64 cents.

Cost to the Standard Oil Trust and Affiliated Industries.

Local pipeage and collection, say	11 cents.	
Main line pipeage to New York Bay, say	5 cents.	
		16 cents.
Difference		48 cents.

Tenth. That on or about the 13th of September last the said Pennsylvania Railroad Company and the Western New York
42 and Pennsylvania Railroad Company, in common with all other railroad companies having lines leading from the oil regions of Pennsylvania to New York bay aforesaid advanced their charges on oil shipped in wooden barrels from the oil regions to New York bay from fifty-two cents as aforesaid to sixty-six cents a barrel, an advance of fourteen cents a barrel, while the rate on tank oil in bulk remains as before, fifty-two cents per barrel. That this advance was made at a season of the year when the export trade is active and when large shipments of and contracts for export oil must be made, and that the effect of such advance is to prevent those affiliated to your petitioners from competing with those affiliated to the Standard Oil Trust for the export trade, and must result in loss and damage to those composing the associations' petitioners and in the still further aggrandizement and increase of the monopoly already possessed and held by the Standard Oil Trust of the petroleum industry of the country.

Eleventh. Your petitioners aver and charge that the said rate of sixty-six cents per barrel on oil in barrels between the oil region and New York bay aforesaid is in contravention of the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to regulate commerce," for the following reasons, viz.

1. It is unreasonable, unjust and excessive.

2. It compels those who pay it to pay a greater sum for a like and contemporaneous service for a like kind of traffic transported under substantially similar circumstances and conditions than is paid by those who transport oil in tank cars between the same points, the said oil in wooden barrels being, under the said Act of February 4, 1887, a like kind of traffic as oil in bulk in tanks, and being transported under substantially similar circumstances and conditions as oil in bulk in tanks.

8. It gives an undue and unreasonable preference or ad-
43 vantage to the Standard Oil Trust and its affiliated firms, corporations, persons and associations over those composing your petitioners' associations.

4. It subjects those composing your petitioners' associations to an undue and unreasonable prejudice and disadvantage over those affiliated with the Standard Oil Trust.

5. It gives an undue and unreasonable preference or advantage to those shipping oil in bulk in tank cars over those shipping in barrel packages.

6. It subjects those shipping oil in barrel packages to an undue or unreasonable prejudice and disadvantage over those shipping by bulk in tank cars.

Twelfth. Whereupon your petitioners pray that the matters herein complained of may be investigated by the Commission and the corporations respondent be ordered to desist from and cease the unlawful acts herein complained of, and to adopt and establish lawful, reasonable and just charges and rates for the transportation of petroleum and its products, and that the petitioners may obtain proper reparation for the injury done to them, and such other relief as the said Commission is authorized to grant.

INDEPENDENT REFINERS' ASSOCIATION
OF TITUSVILLE, PA.,
By JOHN W. WITHEROP, *President.*

The National Oil Company, Limited, a member of the Independent Refiners' Association of Titusville, Pa., wishes to be excepted from joining in reasons two (2), five (5) and six (6), on six page (6) of foregoing complaint.

W. C. WARNER, *Secretary.*
INDEPENDENT REFINERS' ASSOCIATION
OF OIL CITY, PA.,
Per D. E. BYLES, *Secretary.*

FRANKLIN B. GOWEN,
Counsel for Petitioners,
119 *South Fourth Street, Philadelphia.*
M. J. HEYWANG,
Titusville, Pa.

(Endorsed:) Filed Jan'y 30, 1889. E. A. M., Sec'y.

44 UNITED STATES OF AMERICA,
Western District of Pennsylvania, Crawford County, ss.

John W. Witherop, being duly sworn according to law, doth depose and say that he is the president of the Independent Refiners' Association of Titusville, and that the facts set forth in the above petition so far as the same are within his knowledge are true, and that so far as the same are derived from the information of others he believes them to be true.

JOHN W. WITHEROP.

Sworn and subscribed before me this nineteenth day of January, A. D. 1889.

[OFFICIAL SEAL.] GEO. A. CHASE,
U. S. Circuit Court Commissioner for Western District of Pennsylvania.

STATE OF PENNSYLVANIA, *County of Venango, ss:*

D. E. Byles, being duly sworn according to law, doth depose and say that he is the president of the Independent Refiners' Association of Oil City, and that the facts set forth in the above petition so far as the same are within his knowledge are true, and that so far as the same are derived from the information of others he believes them to be true.

D. E. BYLES.

Sworn and subscribed before me this twenty-sixth day of January, A. D. 1889.

[NOTARIAL SEAL.] WM. McNAIR,
Notary Public, Oil City, Pa.

45 "EXHIBIT D."

Before the Interstate Commerce Commission.

No. 153.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PENNSYLVANIA, and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA,

vs.

THE WESTERN NEW YORK & PENNSYLVANIA RAILROAD CO.; THE NEW YORK, LAKE ERIE & WESTERN RAILROAD CO.; THE DELAWARE & HUDSON CANAL CO.; THE FITCHBURG RAILROAD CO., and THE BOSTON & MAINE RAILROAD CO.

No. 154.

SAME

vs.

THE WESTERN NEW YORK & PENNSYLVANIA RAILROAD CO.; THE NEW YORK, LAKE ERIE & WESTERN RAILROAD CO., and THE LEHIGH VALLEY RAILROAD CO.

No. 163.

SAME

vs.

THE PENNSYLVANIA RAILROAD CO. and THE WESTERN NEW YORK & PENNSYLVANIA RAILROAD CO.

46 Complaints filed in first two cases Dec. 4, 1888, and in the third case Jan. 30, 1889. Answers filed Dec, 26, 1888, to

Feb. 28, 1889. Heard at Titusville, Pa., May 15, 1889. Briefs filed Feb. 11, 1890, to Sept. 23, 1891. Decided Nov. 14, 1892.

1. It is the duty of the carrier to equip its road with the means of transportation, and, in the absence of exceptional conditions, those means must be open impartially to all shippers of like traffic.

2. Ownership of a car rented to a carrier, and for the use of which the carrier pays a full consideration, does not of itself entitle the owner to the exclusive use of such car, and, *if* the owner may in the contract of hire to the carrier stipulate for the exclusive use of the car, it must be upon such terms as shall not constitute an unjust discrimination against shippers of like traffic in cars owned by the carrier and who are excluded from the use of the car so hired.

3. Where oil is transported by the carrier both in barrels and tank cars and the use of the tank cars is not open to shippers impartially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is a discrimination against the former in favor of the latter, for which no legal justification has been shown in these cases.

4. The oil rates from Oil City and Titusville, Pa., to New York and New York harbor points and Boston and Boston points, exclusive of the charge for the barrel package in barrel shipments, are not shown to be either unreasonable in themselves, or relatively unreasonable as between those points.

5. An agreement for the pooling of traffic between a carrier by rail subject to the Act to Regulate Commerce and a carrier
47 by pipe line does not fall within the description of contracts prohibited by Section 5 of that Act.

Franklin B. Gowen and M. J. Heywang, for complainants.

James D. Hancock, for Western New York and Pennsylvania Railroad Company.

Francis I. Gowen, for Lehigh Valley Railroad Company.

James A. Buchanan, for the New York, Lake Erie and Western Railroad Company.

James A. Logan, for the Pennsylvania Railroad Company.

F. H. Janvier, for the Lehigh Valley Railroad Company.

Report and Opinion of the Commission.

McDILL, Commissioner:

These three cases were heard together and may be disposed of at the same time.

The Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, the complainants in each case, are composed of separate and distinct companies engaged in the manufacture and sale of refined petroleum and products of petroleum at works owned and ope-

rated by them in the oil regions of Pennsylvania at or near said cities of Titusville and Oil City.

The complaint in the first case is against the Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company, the Delaware and Hudson Canal Company, the Fitchburg, Railroad Company, and the Boston and Maine Railroad Company, and it is alleged therein in substance that complainants as refiners and sellers of petroleum products ship from their works over the railroads of defendants "large quanti-
48 ties of petroleum to Boston, Massachusetts, and intermediate points, and to Portland, Maine, and various points in the New England States, for sale in the markets of said places," and that the said five railroad companies, defendants, as common carriers engaged in interstate transportation, connect with each other, and by and under contracts between themselves and various traffic arrangements form and operate a continuous through route for the transportation of petroleum products, at through joint rates of freight divided among themselves, from the oil refineries of complainants situated as aforesaid, through or partly through the States of Pennsylvania, New York, Massachusetts, Maine, and other New England States. The complaint then charges:

1. That defendants, "for the transportation of the manufactured products of petroleum in barrels in car load lots from Titusville and Oil City, to Boston and other points in the New England States on the line of the Fitchburg Railroad Company and Boston and Maine Railroad Company, called "Boston points," have established and published a schedule of joint through rates, under which they charge and receive "25 cents per hundred pounds, making the rate per barrels $1.00, the weight of the package being included and charged for therein," and that said rates are excessive, unjust and unreasonable, in violation of the Interstate Commerce law.

2. The said rates "subject complainants and their traffic and the said localities to which their petroleum products are carried to an undue and unreasonable prejudice and disadvantage," because, (1) among other things, said rates are "practically prohibitory upon the traffic of complainants to said localities, and under average circumstances and conditions sufficient to nearly absorb the profit of complainants in their trade to said localities, and, under conditions as they exist during some periods of each year and under competition, will entirely absorb all profit in the business of com-
49 plainants to said localities, and if continued will compel them to abandon their trade in that region of country;" and because, (2) said rates "are disproportionate as compared with the rates for the like service in the like traffic under substantially similar circumstances and conditions from Titusville and Oil City to New York and New York points, which rate is now 66 cents per barrel." It is here averred that there is "competition in said traffic by ocean transportation from New York City to Boston points, and any unjust or unreasonable difference in rates to said points as compared with New York points is injurious to complainants

business and discriminates against their traffic and said Boston points."

3. That complainants are subjected to undue and unreasonable prejudice and disadvantage in their said business and undue and unreasonable preference and advantage is given, in relation "to the traffic and transportation of refined petroleum," over the lines of defendants, "to an organization known as the Standard Oil Trust," which is alleged "is formed by a combination of numerous firms, associations and corporations engaged in the business of refining, buying and selling petroleum and its products for home trade and for export, and is also engaged in the business of storing crude petroleum in iron tanks, gathering the same from wells in the oil region of Pennsylvania and transporting it as a common carrier by means of pipe lines to the seaboard, at or near Philadelphia, Baltimore and New York, and to Buffalo, N. Y., and Cleveland, O., the charge to the seaboard through said pipe lines being the same as that made by the railroad companies known as the Trunk Lines." In connection with this allegation, it is further charged on information and belief, "that the defendants, either directly or indirectly, act under contracts, agreements and arrangements made by the said Standard Oil Trust or some of the pipe line common carriers allied with and forming a part of said Standard Oil Trust, to-wit: The National Transit Company, with other common carriers by rail engaged in interstate transportation of petroleum, for the pooling of freights of different competing common carriers and for dividing between them some part of the net proceeds of the earnings of said common carriers from interstate traffic or of said traffic in specie, by means of which such net earnings are divided, in violation of section 5 of the Act to Regulate Commerce;" and that the rates herein complained of are fixed by said combination under said pooling contracts or agreements, "and all connecting roads, including the initial railroad, The Western New York and Pennsylvania, which complainants must use and from which they must and do obtain their rates of through freight, are obliged to accept and charge the rate so fixed, and that said rate is made in the interest of said Standard Oil Trust and its allied companies, and with the intent, *inter alia*, of giving said Standard Oil Trust an advantage over complainants in the manufacture, transportation and sale of their products."

4. That the said rates of 25 cents per hundred pounds and $1.00 per barrel were by a notice dated Oct. 25, 1888, effective Nov. 6, 1888, abrogated and withdrawn as to Manchester in the state of New Hampshire, Salem in the state of Massachusetts, Portland in the state of Maine, and about one hundred and fifty other points in said states reached by the Boston and Maine Railroad Company; that said notice was not communicated to complainants, and public notice was not given thereof, and the same was not posted for public inspection in the depots or stations of the initial road, The Western New York and Pennsylvania Railroad Company, until Nov. 2, 1888; that the defendants, since said rates to said points were so abrogated, have not established and published any rates for said service to said points, although often requested by complainants so to do,

and, while the defendants do not refuse to carry complainants' traffic for said points yet they will not state what the charges will be and give complainants to understand that an arbitrary addition
51 will be made to the said already unreasonable and excessive rates of 25 cents per hundred pounds and $1.00 per barrel (established Sept. 3, 1888) and that, because of these things complainants are unable to ship their products to said points.

The second case is against the said Western New York and Pennsylvania and New York, Lake Erie and Western Railroad Companies, defendants in the first case and, also, the Lehigh Valley Railroad Company, and the complaint relates to the business of the complainants in shipping oil from their refineries at Titusville, and Oil City over the railroads of the three defendants to the Atlantic seaboard at or near Perth Amboy, New Jersey. It is alleged that Perth Amboy is "commercially a New York harbor point," and that "the greater portion of petroleum products shipped by complainants to New York harbor points, is a very low priced refined oil, designated for export and which has no other market." The rate complained of is that fixed by the defendants for the transportation of petroleum products from said refineries over their line through the states of Pennsylvania, New York and New Jersey. The said rate so fixed is stated to be 16½ cents per hundred pounds, or 66 cents per barrel, the weight of the package being included and charged for therein, and then follow the same averments as those in the first case as to the unreasonableness of said rate in itself, its discriminatory character as against the complainants and the alleged pooling contracts or arrangements with the Standard Oil Trust or National Transit Company.

The defendants in the third case are the Western New York and Pennsylvania Railroad Company, a party defendant in the first two cases, and the Pennsylvania Railroad Company. The complainant in this case relates to the through rate on petroleum and its products of the lines formed by defendants' roads from Titusville and Oil City via Irvineton and Corry, Pennsylvania, respectively;
52 to tidewater in New York harbor in the State of New Jersey. It is alleged:

1. That the members of the complainants' associations and other refiners of petroleum, and, also, various persons, firms, corporations and associations affiliated to the Standard Oil Trust, ship petroleum and its products over said lines of the defendants between said points, and that the shippers affiliated to complainants ship principally in wooden barrels or gondola, box, cattle, or other cars, and those affiliated to the Standard Oil Trust ship principally in bulk in tank cars.

2. That a corporation, known as the "National Transit Company," controlled by the Standard Oil Trust owns a pipe line or lines from said oil regions to tidewater in New York harbor, through which oil is transported, and in consequence of the low cost of such transportation, the refining business, of those affiliated to the Standard Oil Trust has increased and become very remunerative and prosperous at the Atlantic seaboard; and that within a few years, and partly due to the concentration of the refining business at the Atlantic seaboard

by those affiliated to the Standard Oil Trust, there has grown into existence a large refining business in the oil regions of Pennsylvania, principally owned by the refiners forming complainants' associations.

3. That "in consequence of an advantage possessed by the refiners forming complainants' associations over the seaboard refiners, for the local and domestic markets of their vicinity and of the west, they have been enabled to maintain and increase their business," but they are subjected to great disadvantage, as compared with the refiners affiliated with the Standard Oil Trust, in respect to tidewater shipments, and in the business of refining petroleum there is about forty per cent. of the product which cannot readily be sold in the United States and must be shipped to the Atlantic seaboard
53 for transhipment to the foreign market, and without this export trade "the business of refining petroleum cannot be carried on with any profit."

4. That the National Transit Company is a common carrier of oil by pipe lines from the oil regions to New York harbor and "for the purpose of enabling it to charge and maintain a high price for the transportation of oil, so as to secure a large profit and maintain an advantage for the Standard Oil Company, and its affiliated industries, now controlled by the Standard Oil Trust, over all competitors," it has entered into a contract with the Pennsylvania Railroad Company for the pooling or division of the traffic on oil by railroad and by pipe line, one consideration of which was the maintenance of the same rates by pipe and rail line and by which the former guarantees the latter twenty-six per cent. of the entire oil traffic between said points, and since the making of such contract, they have maintained the same rate of charges by rail and pipe line on such traffic.

5. That for some years the rate by defendants' lines from the oil regions to New York harbor has been 52 cents per barrel irrespective of whether the oil was shipped in bulk in tank cars or in wooden barrel packages, and under this rate, notwithstanding the disadvantage in rates (estimated at about 48 cents per barrel to which they were subjected in their export trade in competition with their rivals affiliated to the Standard Oil Trust, they were enabled by *their advantages in the local markets to maintain and even increase their business;* but that about September 13, 1888, the defendants, in common with all other railroad companies having lines leading from the oil regions of Pennsylvania to New York harbor, advanced their charges on oil shipped in wooden barrels over such lines from 52 cents to 66 cents per barrel, an advance of 14 cents per barrel, while the rate on oil shipped in bulk in tank cars remained as before 52 cents per barrel; and that the effect of this advance is to prevent the refiners affiliated with complainants from competing with
54 those affiliated with the Standard Oil Trust for the export trade and "must result in the still further aggrandizement of the monopoly of the petroleum industry of the country already held by the Standard Oil Trust." It is charged that the rate of 66 cents per barrel is unreasonable and excessive, that it is discriminatory, that it gives the Standard Oil Trust and affiliated firms and shippers of oil in bulk in tank cars an undue and unjust preference and ad-

vantage over complainants' associations and shippers of oil in barrel packages and subjects the latter to an undue and unjust prejudice and disadvantage.

The prayer in each of the complaints is in substance, that the defendant railroads be ordered, to "cease and desist from" the alleged unlawful acts complained of, to adopt reasonable and just rates for the service of transportation of petroleum and its products over their respective lines between points named, to make reparation to complainants for their alleged injuries, and for general relief.

The railroad companies made parties defendant in the three complaints have filed answers. All allegations of acts or conduct on the part of the defendants in contravention of any of the provisions of the Interstate Commerce Law are put in issue, and the reasonableness of the rates complained of and the justice of the course pursued by the defendants in respect to the traffic which is the subject-matter of the controversy, are affirmed. To avoid unnecessary repetition, the specific denials, admissions, and explanatory and argumentative statements of the several answers, will not be set forth here, but, so far as deemed material, will be referred to and considered further on in the discussion of the questions of fact and law involved in these cases.

It is suggested in the answers of the Western New York and Pennsylvania Railroad Company and also set forth in a memorandum filed by the complainants, that there are other lines of railroads besides those made parties defendant to these complaints, which
55 carry on joint through rates petroleum products from the Western Pennsylvania oil regions eastward for the inland and for the export trade, and that these routes, including those complained against, form two classes, one carrying for the New England trade or Boston points and the other for New York points, each of said classes having the same rates for itself, and that the railroads forming these different routes are interested in the question of the reasonableness of the through rates complained of in these cases. The complainants state that they desire the general rates to be investigated rather than the special features of any particular rate, and have filed the following schedule of such lines or routes:

1. Western New York and Pennsylvania Railroad, West Shore Railroad, Boston and Maine Railroad, Fitchburg Railroad, and several other smaller roads in the New England States to Boston points.

2. Western New York and Pennsylvania Railroad, New York Central and Hudson River Railroad, and Boston and Albany Railroad, to Boston.

3. Western New York and Pennsylvania Railroad, Delaware, Lackawanna and Western Railroad, Delaware and Hudson Canal Company's Railroad, Fitchburg Railroad, to Boston.

4. Western New York and Pennsylvania Railroad, New York Central and Hudson River Railroad, to New York City.

5. Western New York and Pennsylvania Railroad, West Shore Railroad, to New York.

6. Dunkirk, Allegheny Valley and Pittsburg Railroad, Lake Shore

and Michigan Southern Railroad, New York Central and Hudson River Railroad, Boston and Albany Railroad, to Boston.

7. Dunkirk, Allegheny Valley and Pittsburg Railroad, New York, Lake Erie and Western Railroad, Delaware and Hudson
56 Canal Company, Boston and Albany Railroad, to Boston.

8. Dunkirk, Allegheny Valley and Pittsburg Railroad, Lake Shore and Michigan Southern Railroad, New York Central and Hudson River Railroad, to New York, etc.

9. Dunkirk, Allegheny Valley and Pittsburg Railroad, Lake Erie and Western Railroad, Lehigh Valley Railroad, to Perth Amboy, etc.

10. Western New York and Pennsylvania Railroad, Philadelphia and Erie Railroad, Delaware, Lackawanna and Western Railroad, Delaware and Hudson Canal Company's Railroad, Fitchburg Railroad, to Boston.

11. Western New York and Pennsylvania Railroad, Philadelphia and Erie Railroad, Pennsylvania Railroad, to Communipaw, N. J., etc., New York delivery.

12. Dunkirk, Allegheny Valley and Pittsburg Railroad, Lake Shore and Michigan Southern Railroad, West Shore Railroad, Fitchburg Railroad, to Boston.

13. Dunkirk, Allegheny Valley and Pittsburg Railroad, Lake Shore and Michigan Southern Railroad, West Shore Railroad, Boston and Albany Railroad, to Boston.

14. Dunkirk, Allegheny Valley and Pittsburg Railroad, New York, Lake Erie and Western Railroad, New York and New England Railroad, to Boston.

15. Western New York and Pennsylvania Railroad, New York, Lake Erie and Western Railroad, to New York.

16. And the same connecting at Newburg, N. Y., with New York and New England Railroad, to Boston.

Also the two routes mentioned in complaints filed.

Other points and routes incidentally interested:

A. Western New York & Pennsylvania Railroad, Philadelphia & Erie Railroad, Pennsylvania Railroad, "Green Line," to Philadelphia.

57 B. Western New York & Pennsylvania Railroad, Philadelphia & Erie Railroad, Northern Central Railroad, "Green Line," to Baltimore, Md.

On the filing of the memorandum of complainants and the above schedule, this commission ordered that the various carriers composing said routes be furnished with copies of the complaints, answers and orders in these cases and allowed to intervene as parties by filing notices to that effect.

The following are the carriers named in said schedule other than those originally complained against:

1. West Shore Railroad Company.
2. New York Central & Hudson River Railroad Company.
3. Boston & Albany Railroad Company.
4. Delaware, Lackawanna & Western Railroad Company.
5. Dunkirk, Allegheny Valley & Pittsburg Railroad Company.
6. Lake Shore & Michigan Southern Railroad Company.

7. Philadelphia & Erie Railroad Company.
8. New York & New England Railroad Company.
9. Northern Central Railroad Company.

The provisions of the order of the commission were subsequently extended so as to embrace the Philadelphia & Reading Railroad Company and the Fall Brook Coal Company, and they, together with the above named carriers, were served with copies of the pleadings and orders in the several cases and allowed to intervene pursuant to the order of the commission. No answers to the charges in the complaints have been filed by any of there carriers, but the Lake Shore & Michigan Southern Railroad Company enters an appearance and asks notice of hearings and other proceedings, and the New York Central & Hudson River Railroad Company "gives notice of a
58 desire to intervene as a party defendant in said causes and to appear and be heard therein."

The Pennsylvania Railroad Company, in the case against it and the Western New York & Pennsylvania Railroad Company, on June 20, 1891, filed an application to take additional testimony. The complainants, in their answer resisting this application, make certain admissions as to the facts offered to be proven by the Pennsylvania Company, and that company in its reply to the answer of complainants claims that said answer "at least impliedly admits the fact to establish which this respondent in its application asked leave to offer testimony." The application to reopen the case for the submission of additional testimony is made a year and eight months after the last testimony in the case had been taken, and over a year and four months after the case had been submitted on oral argument. There is no claim that the evidence offered has been newly discovered and no excuse whatever is presented for not producing it at the hearings where the Pennsylvania Company was represented by counsel and a large number of the officials of the Pennsylvania Company who had knowledge of the alleged facts if they existed were examined as witnesses. In view of the admissions of the complainants in their answers to the application, which the applicants in its reply to said answer treats as substantially conceding the facts offered to be proven (and which admissions and reply will be duly considered so far as relevant and material in our disposition of the case), and of the further fact that no additional delay should be had in these proceedings except in a clear case of necessity, the application must be and is denied.

Facts and Conclusions.

The *leading* questions raised by the pleadings in these cases relate (1) to the lawfulness of the charge for the barrel package *under the circumstances and conditions disclosed by the evidence;* (2)
59 to the reasonableness in themselves of the rates in question; and (3) to the *relative* reasonableness of the rates to Boston and New England points as compared with those to New York and New York harbor points.

1. The lawfulness of the charge for the barrel package was for the

first time distinctly presented for decision and passed upon by this Commission in the case of Rice *vs.* Western New York and P. R. Co., 3 Inters. Com. Rep., 162, 4 I. C. C. Rep., 131. That case was originally decided adversely to the complainants therein, 2 Inters. Com. Rep., 298, 2 I C. C. Rep., 389, but the complaints in the present cases having been filed about that time, and appearing that a much fuller investigation of the general subject of oil transportation would be made, this Commission, on motion of said complainants, April 15, 1889, issued an order opening said case for further hearing and providing that the testimony taken in the present case should apply to said case, so far as it might be relevant. It is stated in the final decision in the case, that "as first presented it rested mainly upon a comparison of the existing rate with a former rate of 25 cents a barrel from Titusville to Buffalo and with the proportion received by the respondent of a joint through rate from Titusville to the seaboard via Buffalo, but that the additional facts elicited at the hearings of the cases now under consideration introduced other and more important elements tending to show unjust discrimination between shippers of oil in tanks and in barrels, and in other particulars," and it was held in substance that the charge for the barrel package when no charge is made for the package when tanks are used, both modes of transportation being employed by the carriers, was an unjust discrimination against the shipper in barrels in favor of the shipper in tanks, and that the correction of this discrimination required "that in the transportation of oil in carloads, barrels as well as tanks, shall be regarded as only a means of
60 carriage of the commodity, and as in case of transportation in tanks, the rate shall be charged only for the weight or quantity of the oil carried, exclusive of the weight of the barrel, and be the same for like weight or quantity carried in tanks."

The Western New York and Pennsylvania Railroad (which is a party defendant in each of the present cases, being the initial carrier in all the lines complained against) was the sole party defendant in the case of Rice, Robinson & *Winthrop*, but the charge in that case was not only against the rate by that road from Titusville to Buffalo, but also involved a consideration of the proportion received by it of the through rate from Titusville via Buffalo to the seaboard at Perth Amboy, and the facts pertinent to the question of the lawfulness of the charge for the barrel package applicable to that case were substantially the same as those bearing upon that question in the present cases.

The defendants transport oil in bulk in tank cars and in wooden barrels in box and rack cars. Prior to September 3, 1888, the rates over the lines of the defendants on shipments of oil both in tanks and barrels had been the same for a like quantity of that commodity exclusive of any charge for the weight of the barrel in barrel shipments, but about that time, the rates on barrel shipments were increased 14 cents to New York points and more to Boston points, this additional charge being for the weight of the barrel, and as the rates on tank shipments, not including the weight of the tank or package, were not advanced but allowed to remain as they

were, the result was a discrimination in favor of the tank as against the barrel shipper. The question is whether that discrimination is in the language of the statute an "unjust discrimination."

The defendants set up several matters in excuse or justification of their action in this matter. They claimed in the first place that in originally making the additional charge for the barrel
61 package, they did so in compliance with what they conceived to be the ruling of this Commission in reference thereto in the case of Rice *vs.* Louisville and N. R. Co. 1 Inters. Com. Rep. 722, 1 I. C. C. Rep. 503. This point is fully discussed in the case of Rice, Robinson and Witherop and it is made clear that not only no warrant for the action of the carriers proceeded against *in the present cases* is found in any ruling of this Commission, but also that said action is in disregard of the "principle plainly and emphatically laid down by the Commission in said case of Rice and also in the subsequent case of Scofield *vs.* Lake Shore and M. S. R. Co. 2 Inters. Com. Rep. 67, 2 I. C. C. Rep. 90. If it be conceded that in the language used by the Commission in said cases there was some color *for the original institution* of the discrimination arising from the charge from the weight of the barrel, yet no authority for the *continuance* of that discrimination can be predicated of such language since the issuance by the Commission and communication to the carriers of the memorandum entitled *"Re Relative Tank and Barrel Rates on Oil,"* 2 Inters. Com. Rep. 245, 2 I. C. C. Rep. 365, in which it was declared that the action of the carriers in this particular was unwarranted by the decisions in said cases.

Having instituted the discrimination in order, as they allege, to bring their practice into conformity with what they understood to be the rulings of this Commission, the carriers now seek to justify and maintain this departure from their former custom of long standing on other grounds.

It is claimed that in case of special facilities at loading and unloading points, the tank cars are handled more rapidly than cars carrying oil in barrels. This may be true, but the testimony is that the railroads do not provide these facilities and there are none at the seaboard of which the complainants can avail themselves. When special facilities for loading and unloading tank cars are not available, greater delay occurs than in loading and unloading barrel cars.

62 It is further set up by the carriers in justification of the charge by the barrel package, that the barrel belongs to the shipper and is an article of merchandise, and when shipped from the oil region to the seaboard sells for an advance over cost in the oil region equal to the freight paid on the barrel. They estimate the cost of the barrel in the oil region without manufacturer's profit at from $1.11 to $1.16 and the selling price in New York at from $1.30 to $1.32½ per barrel, which would be a profit somewhat greater than the amount of the freight charge of 14 cents. This estimate, however, only includes the cost of the barrel as received from the barrel maker and ignores the further cost incurred by the refiner in preparing the barrel as a receptacle of oil. After the

barrel is received from the manufacturer, the refiner has to paint it on the outside, coat it with glue within, put in a bunghole and provide a bung, plug worm holes, recooper the barrel and see that it is perfectly tight. The proof shows that the cost of the labor and material for this preparation of the barrel is from 16 cents to 17 cents per barrel, and that this added to the original cost as received from the manufacturer makes the total cost per barrel to the refiner from $1.30 to $1.32½, the selling price in New York.

The total cost of the barrel and its preparation to the refiner at Titusville and Oil City is shown by the following itemized statements, the first being made at Oil City and the second at Titusville:

I.

New Barrels with heavy iron for export	1.16
Labor in coopering, gluing, painting and loading on cars per Barrel	.055
Glue per bbl	.065
Paint, Rosin, Naphtha, &c., per bbl	.020
Bungs, Stencils, Brushes, Repairs to machinery and buildings, Steam, &c	.025
Total per bbl	$1.325

63

II.

New Barrels, heavy hoops, average price	1.13
Total labor ..... Per bbl	.06
Glue ..... "	.06
Paint, Rosin, Naphtha ..... "	.02
Bungs, Rivets, Iron, Plugs ..... "	.005
Stencils, Brands, Brushes, Brooms, etc., per bbl	.005
Tools, Utensils, fillers, hose and machinery	.02
Total per barrel	$1.30

If sold in New York or paid for as part of the consignment, the barrel does not bring more than its cost to the shipper and when returned empty it is at the shipper's expense. Moreover, as is said in the Rice, Robinson & Witherop case, "in the carriage of oil the barrel is not shipped as merchandis*t* but as a package or means of transportation of the oil." 3 Inters. Com. Rep. 162, 4 I. C. C. Rep. 152.

It is also maintained that the transportation in tanks yields the carrier a larger revenue above the cost of service than that in barrels. In support of this contention, tables showing dead and paying weight hauled in tank cars carrying oil in bulk and in box cars carrying oil in barrels, respectively, were introduced in evidence on the part of the defendants, and it appears therefrom that the amount of paying freight hauled in the average tank car is greater than that in the average car loaded with barrels, and that in consequence the revenue to the carrier is somewhat greater in the former case than in the latter, even when the barrel package is charged for and is of course

still greater where no charge is made for the barrel package. It is estimated by one of the witnesses that at the present rate of 16½ cents per 100 lbs. to New York points, the carrier would receive on an average train load, the barrel package being charged for, $35.76 more for the transportation of oil in tanks than in barrels, and excluding the charge for the barrel package, $237.20 more. Without affirming the strict accuracy of these tables and estimates, it may be conceded the evidence shows the amount of paying freight to
64 be materially greater in tank shipments than in barrel shipments. In the case of Scofield *vs.* Lake Shore & M. S. R. Co., 2 Inters. Com. Rep. 67, 2 I. C. C. Rep. 90, it was found that "the tank car taking the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with the full load." 2 Inters. Com. Rep. 71, 2 I. C. C. Rep. 103.

This plea that the transportation in tanks is the more profitable to the carrier in yielding a larger revenue above the expense of service was presented in the case of Rice, Robinson & Witherop and was in effect held to be no justification of the discrimination between tank and barrel shippers *under the circumstances and conditions regulating the use of the two modes of transportation.* These circumstances and conditions do not present a case of two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper may take his choice and pay accordingly, but a case where the *cheaper-rated* and, as claimed by the defendants, the *better,* mode of transportation is available practically to only a particular class of shippers. The railroads do not to any material extent own tank cars or furnish facilities for loading or unloading them, but they are owned almost entirely by the shippers and *limited in their use to such owners.* It is claimed by the railroads that it is impracticable for them to own a sufficient supply of tank cars and construct the terminal facilities for the receipt and delivery of oil necessary to their profitable employment and that the cars should be owned and these facilities be constructed by the shipper. In reference to this state of facts the following language is used in the case of Rice, Robinson & Witherop: "It is not the business of the shipper to furnish the vehicle of transportation. That is the duty of the carrier. Under its franchise the carrier must do more than construct his roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open *im-*
65 *partially to all shippers of like traffic.* If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: he must either furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates. For all transportation purposes, so far as the public is concerned, a carrier makes every vehicle his own that he uses upon his road, no matter how acquired. His responsibility to the public is the same in respect to rates and other transportation duties whether he owns or hires his vehicle. When, therefore, he accepts tank cars owned by shippers who can afford to build and furnish them, and has none of his

own to furnish to other shippers, but can supply only box cars in which barrels must be used for oil, he is bound to see that he gives no preference in rates to the tank shipper, and that he subjects the barrel shipper to no disadvantage. It is at this point that the duty of the carrier to the public is rigorous, and where no plea of inability to furnish tanks, or other excuse, is admissible."

It is contended by counsel for the Western New York and Pennsylvania Railroad Company that the Commissioner erred in holding it to be the duty of the carrier to furnish the vehicle of transportation. On this point it is said in the case of Scofield, that while the statute does not clothe the Commission with power to determine what kind or number of cars the carrier shall place upon its line for transportation purposes, yet "the duty of the * * * carrier is none the less obligatory at common law and by its charter to furnish an adequate and proper car equipment for all the business * * * it undertakes and advertises in its tariffs it will do." 2 Inters. Com. Rep., 76, 2 I. C. C. Rep., 117. In Rice *vs.* Louisville and N. R. Co., 1 Inters. Com. Rep., 722, 1 I. C. C. Rep., 547, the Commission says, "it is properly the business of railroad companies to
66 supply to their customers suitable vehicles of transportation and then to offer their use to everybody impartially"—citing Ogdensburg and L. C. R. Co. *vs.* Pratt, 89 U. S., 22 Wall., 123, 133, 22 L. ed. 827, 830. There is no obligation upon any one to enter into the business of common carriage, but having undertaken and advertised to conduct such business, it seems clear that the duty of furnishing vehicles for transportation is incurred. Chicago and A. R. Co. *vs.* Dawson, 79 Mo., 296, 18 Am. and Eng. R. Cas., 521; Ayres *vs.* Chicago and N. W. R. Co., 71 Wis., 372, 380, 5 Am. St. Rep., 226; Smith *vs.* New Haven and N. R. Co., 12 Allen, 531; St. Louis and S. E. R. Co. *vs.* Dorman, 72 Ill., 506.

If it be not the duty of the common carrier to furnish the vehicle of transportation, then his only legal obligation is to transport over his roadbed such vehicles when furnished by others. He could not be compelled to do more, and if he chose to pursue such a course, the privilege of transportation of both person and property over his line might be denied to the great mass of the public and limited tc the few who were able and found it to their advantage to invest in cars for their own use. It is manifest that in such transportation there would be but a small, if any, element of *common* carriage; it would be a prostitution of the franchise received from the State and call for its forfeiture.

In fact and in law, however, the carrier *furnishes the tank as well as the barrel car.* The shipper in tank cars (who is also the owner) is only the *source of supply.* He does not, strictly speaking, furnish the tank car, but lets it to the carrier, charging and receiving the customary mileage both ways, and the carrier, the hirer, furnishes it. If there were nothing more in the transaction than this, it could not be successfully contended that it is not the duty of the carrier to offer the use of the tank car to shippers indiscriminately. But it may be said that the owner of the tank car has acquired these cars for the

purpose of having his own products transported therein, and
67 that in the contract of hire to the carrier he *may stipulate for their exclusive use.* Conceding that this may be done, it must be upon such terms as shall not constitute an unjust discrimination against shippers of like traffic in cars owned by the carrier.

In the Rice case it is said: "The carrier has no right to hire rolling stock and then allow it to be used exclusively by one class of persons on such terms as will drive out of business those who are compelled to use its own rolling stock in a competitive traffic. This, however, is precisely what takes place in this traffic if the rates for the transportation in barrels are considerably in excess of those which are charged for the transportation in tanks. The tank cars, * * * whether the use is paid for or not, ought properly to be held for the use of all; but if this is found impracticable it is very certain and very obvious that proprietorship of the car *for the use of which the carrier pays* * * * can fairly entitle the owner to no special consideration in the making of rates." Rice *vs.* Louisville and N. R. Co., 1 Inters. Com. Rep., 722; 1 C. C. Rep., 548. If the carrier should rent from a car-furnishing company, who are not shippers, cars better adapted to a particular traffic than its own, and should limit their use to one class of its *its* other customers and at a cheaper rate than is charged to its other customers for the use of its own cars, no one could question the injustice of such discrimination. In principle the case is the same, whether the shipper or some outside party is the source of supply.

The tank of the tank car performs the function of a package in tank shipments, as the barrel does in barrel shipments. The carrier, in renting and paying mileage for the tank car, furnishes the tank shipper a package and free transportation thereof; the barrel shipper furnishes his own package and is charged for its transportation. At 14 cents a barrel on the minimum carload of 60 barrels, the discrimination against the barrel shipper amounts to $8.40,
68 equivalent to freight at tank rates on over 16 barrels of oil. The average distance from Oil City and Titusville to New York harbor points by the railway lines between those points is over 500 miles. The mileage paid per car for round trip at ¾ cents per mile amounts to over $7.50. The tank shipper, therefore, receives about $7.50 per round trip for the use of his car, including a package for his oil, while the barrel shipper pays $8.40 per car for the transportation of his packages one way.

The cost of the tank car is from $600 to $634. It requires special facilities for loading and unloading; has to be cleaned out after use to render it fit for carriage of different qualities of oil, and carries no return loads from the east. Barreled oil is transported in box and rack cars; the box cars generally used for that purpose are old and inferior, unfit for the transportation of merchandise in general, and new box cars are seldom so used, as the leakage and odor of the oil are calculated to render them unsuitable for the carriage of freight liable to be damaged thereby. The box car costs about $450. It is estimated, and the evidence tends to show that from five to ten per cent. of the cars used in carrying oil in barrels return loaded.

A statement introduced in evidence, dated October 1, 1889, shows that the total tank-car equipment of the United States so far as then known was 7,864 cars, owned and operated as follows:

Owned by railroads		1342
Owned by companies and individuals not connected with the Standard Oil Company (approximately)		1844
Leased by Standard Oil Company to outside parties		300
Total operated by parties not connected with Standard Oil Company (approximately)		3486
Owned by Standard Oil Company	4497	
Less leased to others	300	
Total operated by the Standard Oil Company		4197
Owned in part by Standard Oil Company		181
		4378
Total tank car equipment		7864

69 From this it will be seen that the Standard Oil Company owns and operates over half of the total tank car equipment of the United States. The complainants manufacture refined petroleum and its products at or near Oil City and Titusville and sell the same in the domestic markets and at the Atlantic seaboard for export. They do this business in competition with the Standard Oil Company and others. The capacity of the refineries of complainants is about two million barrels per annum, and their actual shipments for the year 1888 were about a million and a half barrels of petroleum products. The shipments were entirely by rail and for the most part in barrels.

The counsel for the Western New York & Pennsylvania Railroad Company admits that the methods of making rates by weight including the barrel package "might lead to injurious effects to those who shipped their oil exclusively, or the greater portion of their oil, in barrels," but contends that it would be difficult to decide that this method of making rates was a discrimination in favor of the Standard Oil Company, in view of the testimony introduced which shows that the shipments for that company over the Green Line (which is a department of the Pennsylvania Railroad having charge of all the eastbound transportation of oil in carloads over that road) for the six months ending Dec. 31, 1888, were in barrels, 345,793, and in bulk, 308,899 barrels, and over the New York, Lake Erie & Western Railroad, in barrels, 117,993, and in bulk, 92,730 barrels. These figures show that for the period named the Standard Oil Company and its "affiliated industries" shipped more oil by rail in barrels than in tanks to the east over said lines. During about two months and a half of that period, to wit, from July 1 to Sept. 13, 1888, the charge on the barrel package was not in force, and in the itemized statement introduced in evidence showing shipments by months, the shipments for the last of the six months (December) were less

in barrels than in bulk, being by the Green Line in barrels,
70 35,098, and in bulk, 43,645, and by the New York, Lake Erie & Western Railroad, in barrels, 19,126, and in bulk, 25,538. The aggregate shipments, however, for the portion of the six months during which the charge for the barrel package was in force were greater in barrel than in bulk. The witness by whom this proof was made was in the employ of the Standard Oil Company as assistant manager of the Union Tank Line, and he does not testify positively, but that "he thinks" the same proportion as to tank and barrel shipments prevailed for a like period before and since the period stated. The evidence would have been more satisfactory if some period covered entirely by the barrel package charge had been selected, and the witness had given the figures, presumably accessible to him, showing the shipments during the like periods before and since the institution of the charge for the barrel package. The witness could not state the amount of the Standard Oil Company's shipments by pipe lines or the proportion of such shipments to its shipments by rail. The rate by the pipe lines to the public is the same as the tank rate by rail. The shipments shown by the above figures, moreover, were from Rochester, Buffalo, Pittsburg, Cleveland and other points besides Oil City and Titusville, and in the shipments from the latter points the bulk shipments largely exceeded the barrel shipments, being by the Green Line from Oil City, 156,537 in bulk and 91,089 in barrels, and from Titusville 63,101 in bulk and none in barrels, and by the New York, Lake Erie and Western Railroad, from Oil City, 7,510 in bulk and none in barrels, and from Titusville, 931 in bulk and none in barrels. The ultimate question, however, in these cases relates to an unjust discrimination not as between particular parties, but as between two classes of shippers, the barrel shipper and the tank shipper. The fact that the Standard
Oil Company owns and operates more than half of the total
71 tank car equipment of the United States, would seem to justify the inference that its gain is largely greater than its loss by the discrimination in favor of tank shipments.

In the statement above of the total tank car equipment of the United States, 1,342 is the number given as owned by railroad companies. Of these 1,130 belong to the Pennsylvania Railroad Company, leaving 212 as the number owned by all other railroads in the country. Practically, then, with the exception of the Pennsylvania Railroad Company, the defendants carry oil in tank cars for such shippers only as own the cars and supply them to the roads. The application of that company to take additional testimony heretofore referred to was, so far as deemed material and as stated therein, for the purpose of showing that it is the owner of 1,100 oil tank cars, of which about 450 cars or so many of them as from time to time are necessary to meet the demands therefor, are furnished indiscriminately to all parties desiring shipments of refined oil to points upon its own or affiliated lines of railroads, including the seaboard points on the New York harbor, at Philadelphia and Baltimore, and "that with few exceptions occurring occasionally during the period of heaviest shipments * * * these cars have been equal to, and

often in excess of the demands upon them by shippers." The complainants answering admit that said railroad company "is the owner of about 1,100 tank cars, of which about 450 are devoted to the carrying of refined oil and offered indiscriminately to the shippers of that product;" but allege that "if the demand for these cars is no greater than is stated, it is because the Pennsylvania Railroad Company will not permit them to go to any other place on the seaboard at New York harbor than Communipaw, and only there at the docks of the National Storage Co., which is allied to the Standard Oil Trust, and that it "refuses to permit its cars to go to Perth Amboy, the export station to which the Independent
72 Refiners' (complainants) "ship most largely." In reply, the railroad company construes the answer of complainants as "at least impliedly admitting the said facts to establish which the application was made," and itself admits that "it transports oil going over its lines to the New York seaboard to Communipaw and not to Perth Amboy," assigning as reasons that oil is a traffic dangerous to other merchandise and that has to be handled at a separate point of delivery, and that Communipaw is only a mile and a half from its regular deliveries in Jersey City and the most convenient point for oil delivery by its road, while Perth Amboy is distant about nineteen miles and one of the terminal stations of an active competitor, the Lehigh Valley Railroad Company. It also alleges that the individual shipper can obtain at Communipaw equal facilities at equal rates with those obtainable at Perth Amboy. The allegation of complainants that the road will only deliver at the docks of the National Storage Company at Communipaw and that that company is allied to the Standard Trust is not denied. The evidence shows that the National Storage Company advertises itself as the agent of the Green Line and Pennsylvania Railroad Company, and has charge of that company's terminals at Communipaw and that the tank cars of that line and company are allowed to run only to the National Storage Company's docks. This Storage Company has facilities at Communipaw for unloading tank cars into bulk steamers or vessels but these facilities are not open to complainants, and a witness (Confer) testified that in order to get oil shipped in bulk from Communipaw, the independent refiner has to sell it to the Standard Oil Company. From this state of facts it appears that while about 450 tank cars of the Pennsylvania Railroad Company may be "open to shippers indiscriminately," it is only upon the conditions of shipment to Communipaw for delivery there to the National Storage Company and that the facilities owned by this Storage Company for bulk shipment are not available to shippers in general.
73 The fact testified to, that the facilities of the National Storage Company at Communipaw for bulk shipment are not open to outside shippers and that in order to have oil shipped in bulk from that point it has to be sold to the Standard Oil Company, tends to sustain the allegation of complainants that the Storage Company is an ally of the Standard Oil Trust. The Pennsylvania Railroad has a connection with the Lehigh Valley road seven or eight miles from Perth Amboy and there is no physical obstruction to prevent the cars

of the former road running through to Perth Amboy. The agent in charge of the Green Line at the time of the hearing (Motheral) stated that the tank cars of the Pennsylvania road were not permitted to run to Perth Amboy because of a contract of the road with the National Storage Company to deliver to their yard. The Green Line, as before stated, is the oil transportation department of the Pennsylvania Railroad Company, and this agent testified, that the Green Line could not meet the demand of the business of the Standard Oil Company for tank cars on its line and had to use sometimes as many as 600 cars of the United Tank Line, a department of the Standard Oil Company, in the Standard Oil business.

After full investigation and mature consideration, our conclusion in reference to the charge for the barrel package is in line with that in the case of Rice, Robinson & Witherop and with the principles pertinent to the question laid down in that case and in the cases of Rice and Schofield, and we hold, that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an
74 unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers.

At the institution of these cases, the defendants were making what is termed an "outage" allowance for alleged waste of transportation, of 62 gallons from the full capacity of the tank, with no corresponding deduction on barrel shipments. Notwithstanding this allowance, the shippers received pay for the full capacity of the tank. The testimony tends to show that the Union Tank Line, a department of the Standard Oil Company, was originally the only beneficiary of this practice, but the matter having become known to the other tank shippers, it was then extended to them. After the commencement of these proceedings, the allowance was reduced to 42 gallons. This practice was condemned by this Commission as an unlawful discrimination in favor of the tank as against the barrel shipper, in the case of Rice, Robinson & Witherop and also the recent case of Rice *vs.* Cincinnati, W. and B. R. Co., 3 Inters. Com. Rep. 841, 5 I. C. C. Rep. 193. Since the promulgation of the decision of the latter case, the Western New York and Pennsylvania Railroad Company has issued supplements to all its oil tariffs, effective September 1, 1892, providing, among other things, that "the minimum carloads of tank cars will be the full capacity of the tanks," and the "wastage" allowance has thus been wholly discontinued over the lines of defendants.

II.

The question of the reasonableness in themselves of the rates now in force, exclusive of the charge for the barrel package in shipments, will be next considered.

The defendants in the case against The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie
75 and Western Railroad Company, The Delaware and Hudson Canal Company, The Fitchburg Railroad Company, and the Boston and Maine Railroad Company, form a route over which petroleum products are transported in carloads from the Pennsylvania oil regions to Boston and New England points; the defendants in the case against the Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company, and the Lehigh Valley Railroad Company, form a route over which such transportation is conducted from such oil regions to New York harbor points; and the defendants in the case against The Western New York and Pennsylvania Railroad Company, and the Pennsylvania Railroad Company form what is known as the "Green Line" route from said oil regions to New York harbor. The "Green Line" as before stated, is a department of the Pennsylvania Railroad Company having charge of and conducting the oil transportation over said route. These railroad companies are common carriers engaged in the interstate transportation of petroleum from the Western Pennsylvania oil regions eastward for the inland and export trade and this transportation is conducted on joint through rates except as to the Boston and Maine road, on which through rates are made only to certain junction points. In addition to the roads against which the complaints are filed there are also so engaged the several roads heretofore named to whom leave was given to intervene and be heard as parties defendant. These last mentioned carriers are parts of many different routes (see statement *supra* filed by complainants) by which petroleum products are or can be carried between the points named. In many instances the same railroad forms a link in several routes. The Western New York and Pennsylvania Railroad is the initial carrier in each of the three routes formed by the roads complained against and is also the initial carrier in most of said other routes. All these routes form two classes; one composed of those carrying for the New England trade or Boston points,
76 and the other, of those carrying for New York harbor and vicinity, mainly for export. Each class, respectfully, maintains the same rates. Those rates, so far as shown by tariffs on file with this Commission up to date, have been as follows:

Tariffs issued by Western N. Y. and Penna. R. R. Joint with following lines:		To New York from Titusville and Oil City.		To New York Harbor points.					
				To Jersey City from Titusville and Oil City.		To Perth Amboy from Titusville and Oil City.		To Communipaw from Titusville and Oil City.	
		In bbls.	In T. cars.	In bbls.	In T. cars.	In bbls.	In T. cars.	In bbls.	In T. cars.
N. Y. Lake Erie & West'n R. R.									
November 10, 1887.	Per Bbl.			58	(From			52	(From
March 3, 1888.	" "			52	Titusville.)				Titusville.)
September 3, 1888.	Per 100 lbs.			16½	16½				
October 17, 1889.		18½	18½						
West Shore R. R.									
April 23, 1887.	Per Bbl.			58				52	
July —, 1887.	" "	58							52
September 3, 1888.	Per 100 lbs.								
February 10, 1892.	" " "	18½	18½						
D. L. & W. and Delaware & Hudson Canal Co.'s R. R.		19½	19½						
December 15, 1888.	" " "	18½	18½						
NOTE.—Rates withdrawn Oct. 24, 1891.		18½	18½	18½	18½	16½	16½		
Lehigh Valley R. R.									
September 3, 1888.	" " "	18½	18½						
NOTE.—Rates to New York withdrawn October 20, 1891.									
Issued by Pennsylvania Railroad. (Green Line.)									
April 8, 1887.	Per Bbl.							52	52
February 20, 1888.	" "			52	52	52	52	52	52
September 3, 1888.				66	52	66	52	66	52

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77 To Boston Points.

Tariffs issued by Western New York & Pennsylvania R. R. Joint with the following lines:	Per bbl. (From Titusville.)	To Boston and Boston points from Titusville and Oil City. In bbls.	In T. cars.
N. Y., Lake Erie & West'n R. R.			
Nov. 10, 1887	.....	78	
(NOTE—This rate withdrawn by rates shown on Fitchburg R. R.)			
Fitchburg R. R.			
Sept. 3, 1888	Per 100 lbs....	25	25
Dec. 15, 1888	" " " ...	23½	23½
West Shore R. R.			
April 23, 1887	Per bbl.....	78	
July, 1887	" "	.....	87½
Sept. 3, 1888	Per 100 lbs....	25	25
Dec. 15, 1888	" " " ...	23½	23½
D. L. & W. and D. & H. Canal Co.'s R. R.			
Sept. 3, 1888	" " " ...	25	25
Dec. 15, 1888	" " " ...	23½	23½
Issued by Penn'a R. R. (Green Line).			
Feb. 20, 1888	Per bbl.....	78	78
Oct. 3, 1888	" "	100	78
Jan. 1, 1889	" "	94	74

As to rates prior to these shown in the above tables, the evidence tends to show that from Oil City and Titusville to New York harbor, over the Pennsylvania Railroad Company's Green Line, the open rate was 48 cents per barrel from about July, 1882, to Feb., 1884, and from the latter date to January, 1885, 52 cents per barrel. From both these rates a rebate of 13 cents was allowed, leaving the net rates for said periods, respectively, 35 cents and 39 cents. Beginning at January, 1885, the open rate of 52 cents was paid without any rebate, and from January, 1886, to September 3, 1888, the rate by all lines to New York was generally 52 cents per barrel, but there is evidence tending to show that in 1886 there was a rate of 60 cents to Jersey City.

About 1881, two pipe lines for conveying crude oil from
78 the Pennsylvania oil region to the seaboard were completed, the Tide Water Pipe Line and that of the National Transit Company. The Tide Water Pipe Line was first constructed. Both these pipe lines are carriers of crude oil between the points named and originally were in competition with each other and with the rail lines. The low rates prevailing by rail from about 1881 to about January, 1885, are, it is claimed, attributable to this competition. Under this competition the rates reached a very low, if not unremunerative figure, both by pipe and rail, and about December, 1883, the pipe lines with a view of getting better rates adjusted their differences and the competition between them ceased. The pipe line business appears then to have passed into the control of the National Transit Company. The Pennsylvania Railroad Company about

1885 entered into the contract with the National Transit Company, which, as set forth in the complaint against the Pennsylvania Company and the Western New York & Pennsylvania Company, is a contract "for the pooling or division of the traffic on oil between the Pennsylvania Company and the National Transit Company, one consideration of which contract was the maintenance of the same rate on oil by the railroad and by pipe line and under and by virtue of which the said National Transit Company guarantees to the Pennsylvania Railroad Company twenty-six per cent. of the entire oil traffic from the Pennsylvania Oil Regions to tidewater." The Pennsylvania Railroad Company admits the contract substantially as stated by the complainants, but avers "that the sole purpose of it was to secure and maintain a reasonable and compensatory rate to itself for the service to be rendered; that the rates now charged are only reasonable and just and that it would be impossible to carry said traffic at a lower rate without entailing upon itself unreasonable loss." The evidence tends to show that under this contract the rate of 52 cents per barrel for tank and barrel shipments was put in force both by the pipe lines and by the Pennsylvania Company and was there-
79 upon adopted by all the class of lines to New York harbor points. September 3, 1888, notice was given of an advance of 14 cents per barrel for the weight of the barrel on barrel shipments to become effective September 13, 1888, making the rate on such shipments 66 cents per barrel.

On the basis of the estimated or constructive weights placed by the carriers on oil by the gallon in tank shipments and on the barrel and its contents in barrel shipments (which weights will be considered farther on), both the 52 cents rate and 66 cents rate amounted (when they were adopted) to 16½ cents per hundred pounds of oil transported.

The evidence is to the effect that from 1882 to about March, 1883, the rate to Boston was 65 cents per barrel on both barrel and tank shipments out of which 5 cents was refunded for cartage; that on the latter date, the rate was advanced to 80 cents, with the same reduction for cartage; and that from 1884 to July, 1885, there was what is termed an "export rate" to Boston of 80 cents, with a rebate of 26 cents, making a net "export rate" of 54 cents. The rates of 94 cents per barrel in barrel shipments and 74 cents per barrel in tank shipments (shown in the table of rates to date heretofore given) were estimated to amount to 23½ cents per hundred pounds of oil transported.

The following tables introduced in evidence on the part of the defendants show the rate to within a small fraction, per ton per mile under present through rates, exclusive of the charge for the barrel package, from Oil City over the routes named to New York, to New York harbor and to Boston.

Oil City to New York.

18½c. per 100—$3.70 per ton.

Rate per Ton per Mile via Different Routes.

Via W. N. Y. & P. and P. R. R. 526 miles—7 mills.
Via W. N. Y. & P. and West Shore, 566 miles—6 5/10 mills.
Via W. N. Y. & P. and N. Y. L. E. & W., 520 miles—7 1/10 mills.
80 Via W. N. Y. & P. and N. Y. C. & H. R. R., 582 miles—6 3/10 mills.
Via W. N. Y. & P. and D. L. & W. R. R., 547 miles—6 7/10 mills.
Via N. Y. P. & O. and N. Y. L. E. & W., 551 miles—6 7/10 mills.
Via L. S. & M. S. and N. Y. C. & H. R. R., 659 miles—5 6/10 mills.

NOTE.—In the above rate to New York City is included a lighterage charge, making it 2 cents higher than the rate to New York harbor points—the present rate is 19½ cts. per cwt.

Oil City to New York Harbor.

16½c. per 100—$3.30 per ton.

Rate per Ton per Mile via Different Routes.

Via W. N. Y. & P. and Lehigh Valley, 538 miles—6 mills.
Via W. N. Y. & P. and P. R. R., 526 miles—6 2/10 mills.
Via N. Y., P. & O. and N. Y., L. E. & W., 551 miles—6 mills.

Oil City to Boston.

23½c. per 100—$4.70 per ton.

Rate per Ton per Mile via Different Routes.

Via W. N. Y. & P. and P. R. R.—"Wilkesbarre Route," 747 miles—6 3/10 mills.
Via W. N. Y. & P., West Shore and N. Y. & N. E. R. R., 738 miles—6 3/10 mills.
Via W. N. Y. & P., N. Y., L. E. & W. and Fitchburg, 641 miles—7 3/10 mills.
Via W. N. Y. & P., N. Y. C. & H. R. R. and B. & A. R. Rds., 636 miles—7 3/10 mills.
Via W. N. Y. & P., West Shore and Fitchburg, 633 miles—7 4/10 mills.
Via W. N. Y. & P., D., L. & W., D. & H. C. Co. and Fitchburg, 676 miles—6 9/10 mills.
Via N. Y., P. & O., N. Y., L. E. & W. and Fitchburg, 669 miles—7 mills.
81 Via L. S. & M. S., N. Y. C. and B. & A. R. R., 713 miles—6 5/10 mills.

The average receipts per ton per mile and estimated cost of carrying a ton a mile for the year- ending June 30, 1888, 1889 and 1890, as appears from the reports of the roads named on file with this commission, are shown in the following table:

Average Receipts Per Ton Per Mile and Estimated Cost of Carrying One Ton One Mile for the Years Ending June 30, 1890, 1889, and 1888.

Name of road.	Average receipts per ton per mile.			Estimated cost of carrying one ton one mile.		
	1890. Cents.	1889. Cents.	1888. Cents.	1890. Cents.	1889. Cents.	1888. Cents.
Boston & Albany R. R.	1.105	1.030	1.099	.791	.753	.819
Boston & Maine R. R.	1.706	1.883	2.130	1.090	1.207	1.331
Delaware & Hudson Canal Co.	1.156	1.237	1.229	.523	.529	.511
Delaware, Lackawanna & Western R. R.	.948	.983	1.070	.550	.581	.552
Fitchburg Railroad	.995	1.015	1.116	.733	.777	.840
Lake Shore & Michigan Southern Ry.	.644	.632	.673	.458	.432	.411
Lehigh Valley R. R.	.855	.942	1.069	.609	.591	.841
New York & New England R. R.	1.220	1.344	1.192	.829	.932	1.154
New York Central & Hudson River R. R.	.730	.712	.753	.512	.549	.557
Dunkirk, Allegheny Valley & Pittsburg R. R.	1.543	1.497	1.495	1.209	1.291	1.311
West Shore R. R. (3)	.....	.....	.....	.....	.....	.....
New York, Lake Erie & Western R. R. (1)	.665	.672	.589	.419	.407	.402
(2)	.572	.563	.716	.405	.437	.599
Pennsylvania R. R.	.661	.685	.778	.457	.486	.521
Philadelphia & Erie R. R. (4) Northern Central	.605	.629	.649	.431	.456	.499
Western New York & Pennsylvania R. R.	.576	.600	.650	.422	.451	.460

(1) Line east of Salamanca, N. Y.
(2) Line west of Salamanca, N. Y.
(3) Included in New York Central & Hudson River R. R.
(4) Included in Pennsylvania R. R.

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82 By a comparison of the foregoing tables it will be seen that the rates per ton per mile under the rates per hundred pounds now in force, exclusive of the charge for the barrel package, as shown by the first three tables, are less on several of the roads than the reported estimate in the last table of the cost of carrying a ton of general freight a mile, and are less than the reported average receipts per ton per mile on a majority of said roads.

Evidence was introduced tending to show a lower rate per ton per mile on refined oil between other points and on other lines than the rate per ton per mile under the rates and on the lines involved in these cases, and among others, that in 1886 the rates from Titusville to Indianapolis, Indiana, and other named western points, ranged from 40 cents per barrel of refined oil to Indianapolis, Indiana, to 90 cents per barrel to Omaha, Neb., and Minneapolis, Minn., and that these rates amounted to from 4 mills to 48.7 mills per ton per mile; also, that the rate from Lima, Ohio, to New York on fuel oil in 1888 was 19 cents per hundred weight and 4.9 mills per ton per mile, and from New York to Chicago, on lubricating oil 25 cents per hundred weight and 5.87 mills per ton per mile. While these rates amount to a less rate per ton per mile than the rates now under consideration, this is in many instances due to the greater mileage and it does not appear that the circumstances and condition of the transportation in the two cases are substantially similiar. Something more is required than the mere comparison of rates between different localities on different lines in order to establish the unreasonableness of a rate complained of.

Oil is transported over the lines of defendants under what is known as a commodity tariff and there is no regular classification of it in the Official Classification. The rate on oil is higher than the sixth class rate under the Official Classification. The sixth class rate from Titusville and Oil City to New York City was given as

83 15 cents per hundred pounds less 3 cents lighterage, and to Boston as 18 cents. It is contended by complainants that a comparison of the "nature and value" of the commodities classified and rated as sixth class with oil, shows that the latter should receive a rate even lower than the sixth class rate. As oil shipped in tanks and in barrels must have the same rate, the fact should be duly weighed that in cases of tank shipments to the east there are no return loads and in barrel shipments but a small per cent.—the oil in the latter case rendering the cars unfit for the transportation of general merchandise. The evidence shows that, while the loss from fire is very small, if not insignificant, to the shipper, it has been at times very heavy to the roads—one fire alone from oil destroying about half a million dollars worth of property. These and perhaps other considerations are ignored by complainants in the views they present on the question of oil rates and classification. There is evidence that on the Boston and Maine system and some other New England roads oil is carried as a sixth class commodity and that in the first part of 1887 it was carried from the Pennsylvania oil regions to New York by some of the respondents as sixth class. The object of classification is to furnish a basis for rate charges, but an

incorrect classification would neither authorize an unjust rate nor rendered unlawful a just rate. The question is not one of classification, but as to the reasonableness of the rate under consideration. Murphy *vs.* Wabash R. Co., 3 Inters. Com. Rep., 725; 5 I. C. C. Rep., 122. The fact, if shown, that oil is charged a higher rate than other commodities of like nature and value would be a circumstance to be considered for what it was worth in connection with the other evidence bearing directly upon the reasonableness of the respective rates. Oil may be of like or less value than some articles of the sixth class, but it is different from most, if not all of them, in nature, and we are not prepared to hold under the proof that
84 its transportation is conducted under substantially similiar circumstances and conditions.

There is a network of local pipe lines in the oil regions which convey the oil to the local refineries and to the railroads for shipment, and the charge for this service by these lines is 20 cents per barrel, irrespective of distance. These local pipe lines by which complainants' refineries are served are operated for the most part, if not entirely, by the National Transit Company, which, there is evidence tending to show, is controlled by the Standard Oil Company. The oil regions are divided into three or four "oil fields." One of these is known as the "Bradford Field," and the price of oil quoted on the New York market is the price of the oil of this field. The complainants are in another field and get their oil from the district immediately surrounding them. The oil from this district being fresher, is somewhat better than that from the Bradford district, and there was about two years, before the hearing a premium on it of 8 cents per barrel. The evidence tends to show that this premium represented about the excess in value of the oil in complainants' district and used by them over that in the Bradford district. This premium was, however, raised to 13 cents per barrel, and about August 18, 1888, a short while before the 14 cents charge for the barrel package was placed on barrel shipments, it was raised to 20 cents per barrel. The complainants have to pay, therefore, 20 cents more for the oil used by them than the price of the Bradford oil, which is the New York market price, and this 20 cents, according to the weight of the evidence, is 12 cents more than the difference in the quality of the two classes of oil would justify. The evidence tends to show that complainants get their oil from the National Transit Company, and there is also evidence that the local pipe lines, in order to secure the patronage of the producer, bid against each other for the oil, and that the advance in the premium is due in part, at least, to this competition.

85 The complainants have introduced in evidence two statements of the results of refining 1,000 barrels of crude oil at Titusville and Oil City, respectively, the one showing a loss in refining of $282.93, and the other a loss of $273.45. In the cost are included, among other items, the above mentioned premium of 20 cents per barrel and the pipage to the railroad of 20 cents per barrel. These statements are dated, respectively, May 14 and May 15, 1889. The witness who made out one of these statements (Burwald) testi-

fied that the loss in refining had only been since January, 1889, and had gradually increased during February, March, April and May, 1889. He further stated this was the dull season of the year in the oil business, and that the greater part of the refining business is done from June to January. No item of transportation charges is embraced in these statements except the change of 20 cents per barrel for the service of the local pipe lines, and the losses shown are the results of the refining up to the time of shipment on the railroad. The business of the refineries in the oil regions appears to have been generally unprofitable at the date of the hearings and several of them had partially or entirely ceased operations. About 40 per cent. of the products of the crude oil is an inferior oil, which is for the most part exported and known as "export oil." In the export business, the refiners whose refineries are located in the oil regions are placed at a disadvantage with those of the Standard Oil Company and its allies at the seaboard near New York. The latter own or control the pipe lines to the seaboard, and also the facilities for transfer of the oil out of pipes and tank cars into bulk steamers or vessels. This, together with the fluctuating market prices of petroleum products and other matters hereafter referred to, besides the cost of rail transportation, have probably contributed to depress the business of the local refineries.

The complainants and their witnesses testify that the business of the local refineries cannot be conducted profitably, if at all,
86 under the present rates. On the other hand, the officials and employees of the defendant railroads state that these rates barely afford a reasonable compensation, and that any reduction will be ruinous to their business. In the case of complainants and their witnesses reference is had for the most part to the advanced rate on barrel shipments for the barrel package, resulting in a through rate to New York points of 66 cents per barrel and to Boston points of 94 cents per barrel. The charges in the complaints are against these *rates* as being excessive and unreasonable, and in the case against the Pennsylvania Railroad Company and the Western New York and Pennsylvania Railroad Company the complainants set forth that, notwithstanding they were subjected to disadvantages by the rates prior to the institution of the barrel package charge in their "*export trade* in competition with their rivals affiliated to the Standard Oil Trust," still "they were enabled by their advantages in the *local markets* to maintain and even increase their business." It would appear from this statement and the facts elsewhere set forth as to the transportation and other facilities possessed by the seaboard refineries, that the complainants, or local refineries in the oil regions, had the advantage in the *local markets* and the seaboard refiners had the advantage in the *export trade*, and that the former so far counterbalanced or offset the latter that under the rate existing at the time the charge for the package was placed on barrel shipments the local refiners were able to maintain and increase their business. In regard to the position of the defendants towards the old rates, as before stated in the discussion of the question of discrimination as between tank and barrel shipments, the charge for

the barrel package was not originally made by the roads on the ground that if it was necessary in order to yield them a fair remuneration for the service of transportation, but only, as claimed
87 by them, for the purpose of conforming to what they understood to be the ruling of this commission. Two of the roads against whom complaint is filed, the Fitchburg Railroad Company and the Delaware and Hudson Canal Company, in their answers express willingness for a reduction of the rates. On this point the Fitchburg company says, that "it has no voice or control in the fixing of the rates and charges complained of, the same being made by the trunk lines," and "that it has no objection to the granting of complainants' petition so far as the same relates to the reduction of rates and is willing to take its proportion of the through rates should they be reduced as prayed for," and the Delaware and Hudson Canal Company, "That any rates which have been established for such freight, were established by the initial road without its knowledge and consent, and it is willing to accept any rates for such freight that may be adopted and established by the other roads in interest." In the original printed argument filed Feb. 24, 1890, by counsel for the Pennsylvania Railroad Company, it is only contended "that the present rates, charged, aside from the *additional rate charged on the package,* are just and reasonable." Referring to the testimony on this question the counsel says, "that there is a consensus of opinion of the experts placed upon the stand, that the present rates, *independent of the question of charges for the barrel package,* are just and reasonable," and "that complainants' as well as *defendants'* witnesses agree upon this point." This statement is correct as to at least two of complainants' leading witnesses, namely, A. D. Deming, President of the Independent Refiners' Association of Oil City (one of the complainants), and Louis L. Walz, of the Penn Refining Company. They stated in substance that, if the rates had remained as they were before the charge for the barrel package, they would have *h*een satisfactory and no complaint would have been made.

88 The 52 cents per barrel rate to New York points had been in force for a considerable period before the additional charge for the barrel package was instituted and no complaint is shown to have been made. Under this rate the complainants state they maintained and increased their business. The prior materially lower rates to New York points appear to have been the result of competition between two pipe lines and the railroads. The rate per ton per mile under present rates, exclusive of the charge for barrel package, are not in excess of the reported average receipts per ton mile on about twelve out of fifteen of the roads involved in these cases and interested in the question under consideration; they are much less than such average receipts on nine of them; and are less than the estimated cost of carrying a ton of general freight a mile on four of them. (See table, pg. 111.) While this rate is fully as high as it should be in view of the nature of the traffic and the conditions surrounding it, and might possibly be made less without depriving the carriers of a fair remuneration for their service, we do

not feel authorized under all the facts and circumstances disclosed by the record and evidence in these cases, to order a reduction in addition to the exclusion of the charge for the barrel package, and our conclusion is that the rate to New York points should be not more than 16½ cents per hundred pounds, both in tank and barrel shipments, to be charged in both cases only for the weight or quality of oil carried, exclusive of any charge for the package.

III.

The reasonableness of the oil rate from Oil City and Titusville to Boston and Boston points remains to be inquired into, and in that connection the charge made by complainants against the roads forming lines between said points, that said rate is "disproportionate as compared with the rates for the like service on the like traffic under substantially similar circumstances and conditions from Oil
89 City and Titusville to New York and New York points. The roads involved in this charge allege that the differential rates demanded and collected on the oil traffic to Boston and Boston points are just and reasonable, and in due proportion to those to New York and New York points. The present rates to Boston of 94 cents per barrel on barrel shipments and 74 cents per barrel in tank shipments were, as before stated, estimated to amount to 23½ cents per hundred pounds of oil transported. The 74 cent rate in tank shipments, which is on the oil alone, is 22 cents in excess of the 52 cents rate to New York points. It will be observed that in the table heretofore given of existing rates, the rate to New York City was when these complaints were filed 18½ cents per hundred pounds of oil, being 2 cents more than that to New York harbor points. The rate now by the West Shore line (it has been discontinued by the others) is 19½ cents per 100 pounds, or 3 cents more than the New York harbor rate. This difference is made on account of the lighterage charge paid by the roads where the shipment is to New York City. The rate of 19½ cents per hundred pounds of oil according to the estimate- weight of the contents of a barrel amounted to about 61½ cents per barrel. The rate to Boston, then, of 74 cents per barrel of oil is 12½ cents more than the rate to New York City, and as above shown, 22 cents more than the rate to New York harbor points. The charge for the barrel package being held to be unlawful, our inquiry will relate to the rate of 23½ cents per hundred pounds (estimated to be 74 cents per barrel on the *contents* of the barrel) common to both barrel and tank shipments to Boston. This 23½ cents rate per 100 pounds is 7 cents more than the New York harbor rate of 16½ cents per 100 pounds. The difference between the barrel rate, including the charge for the package to Boston and that rate to New York harbor points is 28 cents, which is greater than the difference in the rates between said points on the contents of
90 the barrel—the latter difference being, as appears above, 22 cents. *The complaint and most of the testimony on the subject relate to the rates including the barrel package charge and the disparity between those rates.* It will, also, be noted that the 74 cent

rate to Boston is 4 cents less than the rate (78 cents per barrel) which had been in force about a year prior to the institution of the charge for the package in barrel shipments. As before stated, about March, 1883, a net rate of 75 cents was adopted, the rate being 80 cents, less a reduction of 5 cents for cartage, and from some time in 1884 to July, 1885, there was a net "export rate" of 54 cents, which was the result of a rebate of 26 cents from the full rate of 80 cents. With the exception of this "export rate," the regular traffic rate from March, 1883, to the present time appears to have been greater than the 74 cent rate (estimated 23½ cents per cwt.) now in force on the barrel in tank shipments. The rate per ton per mile under this through rate is from 6.3 to 7.3 mills by the different routes given in the table, *supra*.

This rate per ton per mile is not only less than the average receipts per ton per mile but also than the estimated *cost* of carrying a ton mile on the following roads running to Boston and to Boston and New England points, as reported by said roads and shown below:

Roads.	Average receipts per ton per mile.			Estimated cost of carrying a ton a mile.		
	1888.	1889.	1890.	1888.	1889.	1890.
	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.
Boston & Albany R. R.....	1.099	1.030	1.105	.819	.753	.791
Boston & Maine R. R.....	2.130	1.883	1.706	1.331	1.207	1.090
Fitchburg R. R.....	1.116	1.015	.995	.840	.777	.733
N. Y. & New England R. R.	1.192	1.344	1.220	1.154	.932	.829

The cost of transportation on the roads running to Boston and Boston points appears to be greater than that on roads to New York and New York points. The distance by shortest route from Oil City and Titusville to Boston is over a hundred miles greater than
91 to New York and New York points and is still greater through Boston to Boston points. It is claimed that the volume of traffic to New York is very much larger than to Boston. There is also a terminal expense at Boston of about 1 cent per hundred pounds included in the Boston rate, which is not the case with the rate (52 cents) to New York harbor points. Moreover the roads to New York harbor are in competition as to the oil traffic, with the pipe lines. The evidence tends to show that the cost of transportation by pipe line is very much less than that by rail.

In the case of the Boston Chamber of Commerce *vs.* Lake Shore and M. S. R. Co., 1 Inters. Com. Rep. 754. 1 I. C. C. Rep. 436, the Commission says: "The contention of petitioners for *equality* of *rates* with New York is not supported by equality of distance, of cost of service, or by other considerations, such as volume of business, competition of rail and waterways, ocean service, terminal facilities,

and storage capacity—all elements of more or less importance in the determination of rates, and some of them of controlling influence." The conclusion in that case was that the Boston Chamber of Commerce had not, "upon any legitimate grounds of rate making, maintained their application for *equality of rates* with New York for eastbound local shipments to Boston." In the recent case of Toledo Produce Exchange *vs.* Lake Shore and M. S. R. Co., 3 Inters. Com. Rep. 830, 5 I. C. C. Rep. 166, the propriety of higher rates to Boston than to New York from Chicago and other western points was maintained, but the methods pursued by the carriers in ascertaining the amount of the difference—that is by a *fixed* arbitrary added to the New York rate—was condemned, and it was held that "the *arbitrary* differential between New York and Boston should be abandoned and the differential should be adjusted upon the basis of percentage." The principal fact upon which this decision rests, is that the rate from Chicago to New York is taken as the basis for
92 rates to Boston and other points. The system of making the rates to Boston and such other points by adding an arbitrary to the New York rate, which arbitrary remained the same notwithstanding changes or fluctuations in the New York rate, was held to be wrong in principle and calculated to work injustice. For example, the Commission say, "By the use of an arbitrary sum there is no proper proportion maintained, if the New York rate changes; thus, if the grain rate to New York were fifty cents the present arbitrary would make the Boston rate 10 per cent. greater; and if the New York rate should be fifteen cents, the use of the present arbitrary would make the Boston rate 33 per cent. greater." In the matter now under consideration of the oil rates from Titusville and Oil City to New York and Boston, respectively, it does not appear that the former is the basis of the latter or that the difference between the two rates is an arbitrary fixed differential. As will be seen from the table of rates heretofore given, the difference between the oil rates to New York and Boston has varied from time to time and the difference on the contents of the barrel is less now by four cents than it was prior to the adoption of the charge for the barrel package.

Oil is not classified but has a special commodity rate. The circumstances and conditions attending its transportation from the Western Pennsylvania oil regions to New York and New York harbor are, as we have shown, materially variant from those which affect that transportation to Boston and New England points, and particularly, *in the matter of pipe line competition*. In view of all the foregoing facts bearing on this question, and the matters hereinafter discussed which are not subject to regulation by this Commission, and which, independent of the rates in question, place the refiners at Oil City and Titusville at a disadvantage as to the New England trade with the seaboard refiners at New York harbor, we are not prepared to hold that the New York and Boston rates on the contents of
93 the barrel (to which our inquiry is now limited) are unjustly discriminative or relatively unreasonable as between those cities. We are also, of the opinion that it has not been made to

appear that a Boston rate of 23½ cents per hundred weight of oil transported, common to barrel and tank shipments and exclusive in both cases of any charge for the package, is in itself unjust or unreasonable. As before shown, this rate is less than the rate previously in force and against which no complaint appears to have been made. The present complaint it is to be noted is against *the rates with the barrel package charge* included.

The Western New York and Pennsylvania Railroad Company issued a tariff sheet, dated April 27, 1888, giving Boston rates on eastbound shipments from Oil City and Titusville in carloads to about one hundred and forty points reached by the Boston and Maine system including Manchester, N. H., Salem, Mass., and Portland, Me. These through rates were abrogated by order dated October 25, 1888, taking effect November 6, 1888, and since that time through rates have been made by the Western New York and Pennsylvania line only to its point of junction with the Boston and Maine road from which juction points the local rates are charged to points of destination. The reason assigned for the withdrawal of the through rates to those points is, that the proportion of the through rate demanded by the Boston and Maine road was so great that the other roads could not afford to maintain it. Only four or five days' notice to shippers and the public of the abrogation of the rate was given. The notice is dated over 10 days before it was to become effective, and the General Freight Agent of the Western New York and Pennsylvania Railroad Company testified that the 10 days' notice required by law would have been given but for the failure of the clerk to whom the matter was intrusted to follow instructions, and that the road offered to refiners to protect any shipments made by them under the cancelled rates prior to
94 the time when the regular 10 days' notice would have expired. There is no other evidence on this point, and it does not appear that the failure to give the notice the required time was *willful*, or that in consequence thereof any *injury* has been sustained by any shipper or any other person. Railroad Commission of Florida *vs.* Savannah F. & W. R. Co., 3 Inters. Com. Rep. 688, 5 I. C. C. Rep. 13. The complainants in their printed brief request this Commission to order a restoration of the through rates abrogated as above stated. Joint through rates are matters of contract or agreement among carriers engaged in interstate commerce, and this Commission has no power under the statute to compel them to enter into an arrangement for such through rates. Capehart *vs.* Louisville & N. R. Co., 3 Inters. Com. Rep. 278, 4 I. C. C. Rep. 265; Little Rock & M. R. Co. *vs.* East Tennessee & G. R. Co., 2 Inters. Com. Rep. 454, 3 I. C. C. Rep. 1.

The evidence tends strongly to show that the Standard Oil Company and its allies own or control the pipe line system to New York harbor points. Whether or not they pay the regular rates, does not appear. If they own the pipe line, the payment of freight charges would be merely going through the process of "taking money out of one pocket and putting it in another;" if they control them, they can, and probably do, dictate terms as to rates. Whether

or not they own the facilities at the seaboard for transhipment of tank oil to bulk steamers or vessels, they have a monopoly of these facilities to the exclusion of complainants. The crude oil is run by them through the pipe lines to the seaboard and there refined. They then ship it by sea (a cheap mode of transportation) to points along the New England coast, where reservoirs are prepared for its reception. From those receiving stations, the oil is carried to interior New England points. By reason of their superior facilities and great advantage in the way of cheap transportation, together
95 with the abrogation of the through rates on the Boston and Maine Railroad system, these refiners at the seaboard near New York are, as competitors of complainants, enabled to undersell them at New England points. The complainants being for the most part barrel shippers, the charge for the barrel package has also contributed to this result. The facilities for transhipment at the seaboard do not appear to be furnished by, or to be under the control of the railroads. It cannot be affirmed with any degree of certainty that the disadvantageous position of the complainants with reference to the New England trade is attributable to rates, the regulation of which is within the control of this Commission under the Act to Regulate Commerce.

The fact that the 52 cent rate to New York harbor points was the result of the contract between the Pennsylvania Railroad Company and the National Transit Company even though the latter company be an ally of, or owned and controlled by, the Standard Oil Company, will not invalidate that rate, if it be in itself just and reasonable. It is contended by complainants that this contract is in violation of Section 5 of the Act to regulate Commerce, which relates to pooling of freights and division of earnings by common carriers subject to the provisions of the Act. This section provides, "That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling *of freights of different and competing railroads*, or to divide between them the aggregate or net proceeds of the earnings of *such railroads*, or any portion thereof." The contracts, agreements or combinations forbidden are those "for the pooling of freights of different and *competing railroads*," or for the division of the earnings "of *such railroads*." The contract under consideration is not one for the pooling of freights of different railroads, or for a division of the earnings of different railroads, but for
96 a division of traffic between a railroad and a pipe line. A railroad is not interdicted from pooling with a competing pipe line. This contract, therefore, does not fall within the description of contracts forbidden in the Act. On this ground the Commission has in the matter of Express Companies expressed the opinion that such companies when in competition might pool their earnings without being guilty of a violation of the law. *Re* Express Companies, 1 Inters. Com. Rep. 677, 1 I. C. C. Rep. 368. Although transportation by express companies and pipe lines should doubtless

be made subject to the provisions of the Act to Regulate Commerce, the failure to make them so can be remedied only by Congress.

When a motion was made by complainants' counsel for the production of the contract between the Pennsylvania Railroad Company and the National Transit Company, it was resisted by counsel for the Pennsylvania Company, on the ground, among others, that it might furnish evidence which would tend to criminate that company. The Commission denied the motion for the reason that if put in evidence the contract would be material only for the purpose of throwing light on the question of the reasonableness of the rates complained of and the facts which the complainants alleged would be shown by the contract had been admitted in the answer of the defendant and therefore the production of the contract itself was unnecessary. In this connection, however, it was said that it was "within the power of the parties holding this contract to remove by its production any proper legal inference that might be drawn from the facts that are admitted and that if not produced they are probably prepared to accept whatever legal consequences may follow from a refusal to produce." It is difficult to conceive any legitimate inference consistent with absolute fair dealing to be drawn from the refusal to produce the contract and, particularly, when one of the grounds of the refusal is that above stated.

97 The precise date of this contract is not shown but it appears to have been made in the first part of 1885. About August 18, 1888, the advance to 20 cents per barrel of the premium on oil used by complainants took place; a little over two weeks thereafter, on September 3, 1888, the charge for the barrel package in barrel shipments was adopted; and on October 25, 1888, the through rates to points on the Boston and Maine Railroad system was abrogated. These three events, occurring within a period of two months and a week, all prejudicial to the complainants as refiners at Oil City and Titusville and advantageous to those at the seaboard in the vicinity of New York, lend color to, if they do not substantiate, the charge made by complainants of concert of action between the roads immediately concerned and the seaboard refiners for the purpose of favoring and giving an undue advantage to such seaboard refiners to the disadvantage and at the expense of complainants. The defendants are not shown, however, to be in any way responsible for the advance in premium and it does not appear to be a matter subject to regulation by this commission, and, as before stated, we have no power to order a restoration of the abrogated through rates.

By the supplements of the Western New York & Pennsylvania Railroad Company to its oil tariffs, effective September 1, 1892, heretofore mentioned, not only was the "wastage" allowance in tank shipments discontinued, but the estimated weight of a gallon of tank oil was raised from 6.3 pounds to 6.4 pounds. Fifty gallons being the contents of a barrel, as adopted by the roads for transportation purposes, the weight per barrel at 6.3 pounds per gallon was 315 pounds, and at 6.4 pounds per gallon it is 320 pounds—a difference of 5 pounds. The rates per hundred pounds are unchanged. At the rate to Boston and Boston points of 23½ cents per hundred

pounds, the 5 pounds increased weight would amount to an increase on rate on tank shipments of 11.7 mills per barrel, and at the 16½ cents per hundred pound rate to New York harbor
98 points, to 8.2 mills. This increase of rate per barrel on tank shipments is inconsiderable *in comparison* with the greater charges on barrel shipments (arising from the charge for the barrel package) than on tank shipments to those points, which are, respectively, 20 cents and 14 cents. By the Pennsylvania Railroad (Green Line) the oil rate is by barrel alone and not by the hundred pounds. The barrel rate by that line appears to have remained unchanged. This being the case and the number of gallons per barrel remaining the same, the increase of weight per gallon can effect no change of rates as to that line. Where the rate is by the barrel and remains unchanged an *actual* increase of the weight of the contents will effect a decrease of rate, as more oil will be hauled for the same price, but if there is no actual but only an estimated increase of weight of contents there will result no change of rate, as the same quantity will still be hauled for the same price. While the weight of the tank gallon was at the commencement of these proceedings and until recently (September 1, 1892) placed by the carriers at 6.3 pounds, the weight of the barrel and contents in barrel shipments was placed at 400 pounds—the contents in both cases being 50 gallons. These weights of the gallon and of the barrel and contents are *estimated* weights, and it is shown in the case of Rice *vs.* Cincinnati, W. & B. R. Co., 3 Inters. Com. Rep. 841, 5 I. C. C. Rep. 193, that they vary materially from the actual average weights, and result in "a constant and appreciable advantage to the shipper in tanks." The grounds of this ruling are clearly and forcibly stated in the opinion in that case and need not be repeated here. The raise in the weight of the tank gallon was made since that decision was rendered, and, being without a corresponding raise in the weight of the barrel and barrel contents in barrel shipments, was, doubtless, intended to do away with the discrimination in this respect against the barrel shipper. The order of the Commis-
99 sion in that case was that the defendants "base their charges on petroleum and its products upon the *actual weight* of shipments, whether in tanks or barrels; and for all cases where actual weights cannot be ascertained without great inconvenience," that they "adopt and employ such a rule or method of estimating weights as shall practically operate to secure to the shipper in barrels, for the same aggregate sum as may be paid by the shipper in tanks in any case, the transportation between the same points of an equal amount of freight paid for." (This order, it was declared, should not "be understood as authorizing charges on barrels when tanks are carried free, that question being expressly reserved for future consideration.)" The raising of the gallon tank weight from 6.3 pounds to 6.4 pounds, the weight of barrel and contents being estimated at 400 pounds as before, is not a compliance with the order that "charges on petroleum and its products be based on *actual weight*, whether in tanks or barrels." Whether the condition exists on which the alternative requirement of the order is based, that

"actual weights cannot be ascertained without great inconvenience," and if so, whether the raise of the tank gallon weight to 6.4 pounds meets that requirement, we abstain from determining on the facts and evidence now before us, and these cases will be held open for further developments and investigation in reference to these matters. As to the Pennsylvania Railroad (Green Line), as we have seen, the rate being by barrel alone both in tank and barrel shipments, the increase in estimated weight of the tank gallon effects no change in the relative rates on tank and barreled oil.

The practice of making arbitrary reductions in computing freight charges from the actual amount of the commodity transported and for which the shipper receives pay, as in the case of the discontinued "wastage" allowance on tank shipments, and of *estimating* weights where it is practicable to ascertain actual weights, opens the door for preferences, discriminations and evasions of the
100 law. The material facts as to estimated weights in tank and barrel shipments being substantially the same in the present cases as in the case of Rice *vs.* Cincinnati, Washington & Baltimore R. R. Co., the order above recited, issued in the latter case, is adopted in the present cases and the defendants herein are directed to comply therewith.

It is further ordered, That the defendants' cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants, and others who may apply therefor, for the purpose of loading and shipping oil therein to such New York harbor and Boston points as the shipper may direct; and that said defendant notify the public accordingly by publication in their tariff of rates and charges, pursuant to the provisions of sections 6 of the Act to Regulate Commerce, and also file copies of said *traffic* with this Commission as required by the provisions of said section. It is further ordered that the rate on shipments of oil both in tanks and in barrels over said roads shall be the same and said rate from said oil regions to New York points shall not exceed 16½ cents per hundred pounds, and to Boston and Boston points shall not exceed 23½ cents per hundred pounds; and the defendants are required to refund to the several parties legally entitled thereto, within 60 days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package on shipments of oil in barrels, when the use of tank cars had not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use.

Inasmuch as the amounts wrongfully received from the complainants respectively cannot be ascertained from the evidence
101 already taken, the proceedings will be continued for such further action or inquiry in that behalf as may become necessary.

We desire to supplement our conclusions in this case with the following remarks:

In cases at bar the principal cause of alleged unlawful discrimination is the charge for the barrel, and our attention has been practically directed to that feature of the transportation. In order to guard against misapprehension the commission wishes to say that these cases are decided purely upon the facts as set forth in the situation as delineated in the record and by the evidence. It is not intended to hold, nor should this report be construed to hold, that, aside from other controlling circumstances, the carrier in hauling packages is not entitled to pay according to the weight thereof. It is simply held that on account of the peculiar circumstances in these cases to charge for the weight of the barrel places barrel shippers at a disadvantage as against tank shippers, and the practice in these cases, while the circumstances and conditions remain unchanged, should be condemned.

It was stated in the Rice cases, 3 Inters. Com. Rep. 841, 5 I. C. C. Rep. 193 that

"Whether the advantages which the tank shippers apparently enjoys are a mere incident of his business, for which the carrier should not be held responsible, or whether these benefits result from discriminating usages adopted by the railroads, and their failure to supply all customers with a special vehicle suited to the demands of a special traffic, must be, in any particular case, a most perplexing inquiry. To require the barrels in which this article is shipped to be carried without expense is contrary to the general and lawful custom which includes the package in the freight to be paid for, yet, in certain situations and under certain circumstances, there may be no other remedy for actual injustice, and no other effectual
102 means by which the carrier can render equal and impartial service to every patron.

"We have already taken occasion to point out the only instance in which this precise claim has been heretofore made or allowed, and in doing so have sought to emphasize the proposition that rulings based upon special facts and local conditions are not to be regarded as formulated precepts for general observance."

These Rice cases cover the greater portion of the country, and the conditions of transportation and of commerce, vary greatly in the different sections affected by the controversies; but the cases now under consideration relate to the transportation of oil from the refineries to the seaboard, and through a comparatively small territory in which the Commission has been investigating cases involving oil transportation for a number of years. Upon the facts herein we are forced to the conclusion that the only practical remedy for the unjust discrimination now existing is to give defendants the alternative of abolishing the charge for the barrel, and in so doing we are only permitting them to return to a practice which they followed during a long period, which they only discontinued under a mistaken construction of our original Rice decision, and which they now seek to justify on wholly different grounds.

103 "EXHIBIT E."

At a general session of the Interstate Commerce Commission held at its office, at Washington, D. C., on the 14th day of November, A. D. 1892.

Present: Hon. William R. Morrison, chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements, Commissioners.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PENNSYLVANIA, and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA,

vs.

THE WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, THE DELAWARE AND HUDSON CANAL COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON AND MAINE RAILROAD COMPANY.

SAME

vs.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, and THE LEHIGH VALLEY RAILROAD COMPANY.

104 SAME

vs.

THE PENNSYLVANIA RAILROAD COMPANY and THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and investigation of the matters and things herein involved having been had, and the Commission having on the date hereof made and filed a report and opinion containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order, and the commission having, as appears by said report and opinion, found and decided, among other things, that the wastage allowance of forty-two gallons per tank car heretofore deducted by defendants from shipments of petroleum oil in such cars before computing freight charges thereon, and the method of estimating weight of such oil shipped in tank cars and in barrels by which the shipper in tanks was enabled to secure the transportation of a greater amount or weight of oil for the same aggregate sum as was charged for a like service in the transportation of oil in barrels, were and are unlawful; that the action of the defendants in charging for the weight of barrels on shipments of refined oil in barrels over the several through lines formed by their respective railroads from Titusville, Oil City, and other points in the oil regions of Western Pennsylvania, to New York and other points on New York harbor,

or to Boston and points called and known as Boston points, works unjust discrimination against the shipper of such oil in barrels in favor of shippers of the same commodity in tank cars, while said defendants refuse or neglect to furnish tank cars to com-
105 plainants and other shippers for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; that rates per hundred pounds on shipments of oil in tanks or in barrels should be the same, and from said points in the oil regions of Western Pennsylvania to New York harbor and Boston points such rates should not exceed 16½ cents and 23½ cents respectfully, and that defendants should make reparation to complainants and others in all cases where charges on shipments in barrels between those points have included a charge for the weight of the barrel, and tank cars have not been open impartially to shippers of refined petroleum oil over their lines:

It is Ordered and Adjudged, That the defendants, The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railway Company, The Delaware and Hudson Canal Company, The Fitchburg Railroad Company, The Boston and Maine Railroad Company, The Lehigh Valley Railroad Company, and The Pennsylvania Railroad Company be, and they severally are hereby, required to base charges for the transportation of refined petroleum oil over their lines upon the actual weight of shipments, whether in tanks or barrels, except in cases where such actual weight cannot be ascertained without great inconvenience, when such a rule or method of estimating weights shall be adopted and employed by them as will practically operate to secure to any shipper of such oil in barrels the transportation of an amount or weight of freight equal to the amount or weight of freight which, for the same aggregate sum, they contemporaneously carry or offer to carry between the same points for any shipper of such oil in tanks, and that these cases be held open for such further and more specific directions in regard to such assumed or estimated weights as may hereafter appear necessary, and that said defendants and each of them do also abstain from allowing on shipments of petroleum in tank cars a deduction of 42 gallons per tank before freight charges are
106 computed or any such allowance or deduction whatever, unless a corresponding and equivalent concession be made on shipments of such oil in barrels.

It is further Ordered and Adjudged, That said defendants be, and they severally are hereby, required to wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipment of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points, or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct, and that on or before the 9th of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges, pursuant

to the provisions of section 6 of this Act to regulate commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section; and defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within 60 days after notice of this decision and demand thereof by such parties, all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels when the use of tank cars has not been opened to shippers impartially and the shipper claiming reparation has been thereby deprived of their use; and inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary.

It is further Ordered and Adjudged, That the rate on ship-
107 ments of refined petroleum oil, both in tanks and in barrels, over said roads or lines shall be the same, and that said rate from said oil regions to New York points shall not exceed 16½ cents per hundred pounds, nor shall said rate from said oil regions to Boston and Boston points exceed 23½ cents per hundred pounds, and said defendants are hereby required to arrange their tariff of rates and charges accordingly.

It is further Ordered, That a notice embodying this order be forthwith sent to each of the defendant corporations, together with the report and opinion of the Commission herein, in conformity with the fifteenth section of the Act to regulate commerce.

108

"EXHIBIT H."

Before the Interstate Commerce Commission.

No. 153.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PENNSYLVANIA, and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA,

vs.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, THE DELAWARE AND HUDSON CANAL COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON AND MAINE RAILROAD COMPANY.

No. 154.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PENNSYLVANIA, and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA,

vs.

THE WESTERN NEW YORK AND PENNSYLVANIA RAIL- COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, and THE LEHIGH VALLEY RAILROAD COMPANY.

109

In the Matter of Reparation.

1. On the failure of the defendant common carriers to cease charging for the transportation over their respective roads of barrel packages containing oil shipped from points in Western Pennsylvania to New York Harbor points and Boston and Boston points, or as an alternative, promptly furnish tank cars to shippers of oil between said points, and to file and publish tariffs accordingly, and to make reparation to injured parties legally entitled thereto by refunding all sums received for carrying barrel packages containing oil shipped between said points when the use of tank cars for such shipments had not been open to shippers impartially, and shippers had been thereby deprived of their use, all of which was required of defendants by order entered in these cases on November 14, 1892, and upon the filing of itemized claims for reparation, due hearing of the claimants and defendants, and full investigation of the matters involved:

Held, that the claims for reparation served upon defendant initial carriers by claimants, according to a stipulation entered into by the parties, are the claims to be considered in these cases. That the parties legally entitled to reparation under said order of November 14, 1892, are oil shippers from Titusville, Oil City and vicinity, who were members of the complaining associations at the time the complaints were filed, or subsequently, up to the date of the hearing at Titus-

ville on May 15, 1894. That the time which the claims herein may properly cover is from September 3, 1888, when the practice of charging for carrying barrels containing oil was commenced by defendants, to May 15, 1894, when hearing on the claims was had. That the shipments as to which
110 reparation should be made are those from Titusville, Oil City or vicinity to New York or New York Harbor points, or Boston or points taking the Boston rate, that passed over routes in which some one of the defendants was the carrier receiving the freight for transportation, initiating and controlling the method or mode of carriage and billing the freight through to destination at the aggregate rates of compensation charged. That the amount to be refunded is the charge collected by defendants for the transportation of barrels containing petroleum oil shipped and carried as aforesaid. That the defendants are severally liable for the full amount of damages proved in these cases to result from violations in which they or either of them participated.

2. The specific provision in the law for individual liability of carriers for the full amount of damages sustained through enforced payment of excessive transportation charges or other practices condemned in the statute makes it unnecessary that all the carriers over any particular route shall be before the Commission to enable it to direct reparation for wrongs which have been inflicted upon shippers under any such charge or practice.

3. Receivers of railroad companies are common carriers subject to the prohibition and requirements of, and to regulation under, the Act to Regulate Commerce.

4. Where connecting carriers make a through route and establish through rates which apply as single charges for the whole service, they hold themselves out as carriers over such route at such rates, and must be prepared to furnish suitable "instrumentalities of shipment and carriage," so that the transportation may be conducted without wrong or injustice to those who desire to use the through line.

5. The mere circumstance that the Boston and Maine received a share of the total through charge which was equal to its in-
111 dividually established rate from Boston to the points of destination, is altogether insufficient to make these shipments take on a purely local character over the Boston and Maine; and if the shipments were not in all essential respects local from Boston to the destination points, than they were through shipments over the through line of the connecting carriers, and must be so treated.

6. It appearing that the wrongs found to exist in these cases result from unequal conditions of carriage and shipment imposed by the defendants antecedent to the time of shipment, that the movement of the property depended upon the shipper's acceptance of conditions thus notified to him in advance, that he had to regulate his price for oil accordingly, and

that the cost of transportation was borne by the claiming shippers.

Held, that it is not material whether the claimants, who are all shippers, or whether the consignees paid the transportation charges.

Held, further, that the violations of law found in these cases do not arise through any breach of contract, but from failure on the part of carriers to perform their public duties.

7. The Lehigh Valley Railroad Company, a common carrier subject to the provisions of the Act to Regulate Commerce, could not, by leasing its road, free itself from liabilities for practices made illegal by that statute; nor, after resuming operation of its property, pending proceedings against it to enforce statutory provisions so violated, and to recover damages for injuries sustained under such violations, can it claim exemption from liability during the time of the lease.

8. Shippers whose claims may be covered by the order entered herein on Nov. 14, 1892, but which have not been served
112 in these reparation proceedings, are, upon failure of defendants to make proper refund of excessive charges, entitled to proceed, upon the basis of reparation prescribed in said order, to enforce their claims in the courts as provided by law.

M. J. Heywang, for complainants.
Frank Rumsey, for Western New York and P. R. Co. and S. G. De Coursey, Receiver.
H. Schoonmaker, for New York, L. E. and W. R. Co. and J. G. McCullough and E. B. Thomas, Receivers.
David Wilcox, for Delaware and H. Canal Co.
George A. Torrey, for Fitchburg R. Co.
Sigourney Butler, for Boston & M. R. Co.
Francis I. Gowen, for Lehigh Valley R. Co.

Report, Opinion, and Orders of the Commission.

By the Commission:

Upon a report and opinion filed and by order entered herein on Nov. 14, 1892, the defendants in the above entitled cases were required, among other things, as follows:

"To "cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct, and that, on or before the 9th day of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges, pursuant to the provisions

of section 6 of the Act to Regulate Commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section.

"And said defendants are further hereby directed and required to refund to the several parties legally entitled thereto,
113 within 60 days after notice of this decision and demand thereof by such parties, all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels, when the use of tank cars has not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use; and inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary."

The above mentioned portion of said order has not been complied with by the defendants in these cases in any respect. Upon application of counsel for various claimants seeking reparation under the order, a hearing to ascertain "what amounts have been wrongfully received from complainants and others who may be entitled to such reparation" was held at Titusville, Pa., on May 15 and 16, 1894. Proof was then submitted by claimants as to their respective demands, but as copies of the claims presented had not been served upon the defendant carriers, a stipulation was entered into between counsel for claimants and counsel representing the several defendants in this respect, to the effect that the claimants should serve copies of their claims upon the initial carriers, and that thereupon such carriers and the connecting carriers in the several routes would examine and check the various items set forth in the claims and afterwards file the same, together with statements, with the Commission. This operated to delay the proceeding until the terms of the stipulation should be carried out or until the Commission should enter some further order limiting the time of the parties to conform to such agreement. Considerable delay resulted from the failure of claimants to promptly serve copies of their claims, and the carriers also evinced no disposition to
114 hurry this matter of reparation to a close. This continued until June 10, 1895, when the Commission issued an order directing the carriers to complete their examination of claims served under the agreement and file the same with statements thereon not later than June 25, 1895. This time was extended by subsequent order, applied for by the Lehigh Valley Railroad Company, until July 15, 1895. The claims which were served upon defendant initial carriers by claimants, the originals or duplicates thereof now being on file in these cases, are the claims to be considered in this report.

These matters have been regularly heard and the defendant carriers have had full notice and ample opportunity to examine and oppose the claims.

The defendants have not, as required by our order of Nov. 24,

1892, notified the public by filing and posting oil tariffs, that they or either of them would supply shippers with tank cars for oil transportation to New York harbor or Boston points. Such cars are not and have not been open to the use of shippers generally on any of the defendant roads. On the contrary, before and since the complaints were filed in these cases, it has been the practice of the defendants to hire tank cars of owning shippers by paying mileage thereon, while at the same time denying other and competing shippers the right to use such cars, and compelling them to ship their oil in barrels and pay transportation charges on the weight of the barrel.

The parties legally entitled to reparation at the hands of the defendants under our order of November 14, 1892, are oil shippers from Titusville, Oil City, or points in the vicinity thereof, who are members of the complaining associations at the time the complaints were filed, or subsequently, up to the date of the hearing of these reparation matters at Titusville on May 15, 1894.

The time which will be considered as proper covered by claims for reparation in these cases is from September 3, 1888, the
115 date when the practice of charging for carrying barrels containing oil was commenced, to May 15, 1894, when hearing on the claims was had.

The shipments which may be included in the claims are those from Titusville, Oil City and vicinity to New York and New York harbor points and Boston and points taking Boston rates, and which passed over routes in which some one of the defendants was the carrier receiving the freight for transportation, initiating and controlling the method or mode of carriage, and billing the freight through to destination at the aggregate rates of compensation charged.

The amount to be refunded is the charge collected by defendants for the transportation of barrels containing petroleum oil shipped and carried as aforesaid, and where this barrel charge has not been exactly figured and reported by the defendant initial carrier, such charge will, as found in our report and opinion of November 14, 1892, be 14 cents per barrel to New York harbor points and 20 cents per barrel to Boston and Boston points, except where a lower charge per barrel is demanded in said claims.

The question of liability for the wrongs found to have been done to shippers demands more extended notice.

The conduct of the carriers, as shown in these cases, was in plain violation of rules for equal treatment prescribed in the law. Mere statement of the carrier's practice is sufficient to demonstrate that the conditions thus arbitrarily imposed upon shippers who did not own tank cars resulted in placing such shippers at a palpable disadvantage, and brought about undue preference to favored competing shippers. The carriers, by hiring shippers' cars, each paying rental based upon mileage run over their roads, and by confining such cars to the owning shippers' use, gave such shippers an enormous business advantage. Precisely the same unjust discrimination was practiced against shippers thus obliged to send oil only in barrels and

pay charges on the weight of the barrel, as would have bee
116 enforced if the carriers had hired or purchased tank ca
from outside parties and limited their use to some shipper
thereby compelling other and competing shippers to ship oil i
barrels and pay for the transportation of the barrel or not shi
oil at all. In our investigation and decision in these cases we di
not inquire or determine whether the mileage paid to the ownin
shippers was an excessive rental, and consequently an additiona
advantage to such shippers; the order awarding reparation due t
injured parties was based solely upon the fact that barrel charg
were exacted from shippers of oil by that method, while the defend
ants denied such shippers the use of tank cars, which was freel
granted by them to other shippers in the same business. It matte
not how the custom grew up, nor what were the reasons which in
duced the carriers to establish the practice; they were subject t
provisions of law which plainly made their action unlawful.

The eighth section of the Act specifies the degree of liability
"That in case any common carrier subject to the provisions of th
Act shall do, cause to be done, or permit to be done, any act, matte
or thing in this Act prohibited or declared to be unlawful, or sha
omit to do any act, matter, or thing in this Act required to be don
such common carrier shall be liable to the person or persons injure
thereby for the full amount of damages sustained in consequenc
of any such violation of the provisions of this Act, together wit
a reasonable counsel or attorney's fee, to be fixed by the court i
every case of recovery, which attorney's fee shall be taxed and co
lected as part of the costs in the case." The defendants are seve
ally liable for damages resulting from any violations found in the
cases in which they or either of them participated.

It is true that to enforce required changes in published tarif
or rate sheets, the order should be directed against all the carrie
which participate in the transportation between points a
117 fected by the rates; but where, as in these cases, the la
specifically provides for the individual liability of any ca
rier concerned for the full amount of damages sustained throug
enforced payment of excessive transportation charges or other pra
tices made unlawful by the statute, it is not necessary to have a
the carriers over any particular route before the Commission t
enable it to direct reparation for wrongs which have been inflicte
upon shippers under any such charges or practices.

The sums received by the defendants for the transportation of th
barrel package containing oil over their respective roads or lin
must, under the law, be held to be the full amounts paid for carryin
the barrel package between the points of shipment and destinatio
By what carrier over any of these lines the excessive charge was r
ceived, or how it was divided, cannot augment or diminish the se
eral liability of the defendants for the whole damage.

The above quoted provision of the eight- section is broad enoug
to charge each of the defendants with liability for the full damage,
it participated in the traffic at all, regardless of whether any one
the defendants was "the carrier receiving the freight for transport

tion, initiating and controlling the method or mode of carriage and billing the freight through to destination at the aggregate rates of compensation charged." We think, however, that such limitation should control in these cases, for the reason that the alternative action allowed by our order of November 14, 1892, the furnishing of tank cars to shippers, must be taken by the carrier on whose road the shipment originates, and that such cars must, if provided at all, be supplied from equipment in its possession, or by it through arrangement with the connecting carriers.

It may be urged as an objection to our construction of the statute in these cases, as affecting oil transportation generally over connecting lines, that while an intermediate or terminal carrier in a line may be in a position to furnish tank cars to its own
118 shippers, it may while so doing, be unable to provide such cars for shipments over its road from points on the roads of connecting carriers having no tank cars, and that to compel it to carry the barrel package free in shipments received from carriers having no tank cars, would be unjust. But there would not be any force in such an objection. When connecting carriers make a through route and establish through rates which apply as single charges for the whole service, they hold out themselves as carriers over such route at such rates, and must be prepared to furnish suitable "instrumentalities of shipment and carriage," so that the transportation may be conducted without wrong or injustice to those who desire to use the through line.

At a hearing, counsel for the Boston and Maine Railroad Company claimed partial exemption from the order for reparation on the ground that, as to the oil shipments transported over its road from Boston to Boston points, it was not a party to any joint tariff or rates, except during the period from September 3 to November 6, 1888, when, by supplement to Oil Tariff 72, the tariff then in force, those points reached by the Boston and Maine from Boston were excepted from the operation of such joint tariff. There is no denial that the transportation by the Boston and Maine to those points was under the through billing and part of the continuous carriage of through shipments from the refining points to destination, or that a single charge for the whole service was made and collected on each shipment and subsequently divided among the carriers over the through line. The mere circumstance that the Boston and Maine received a share of the total through charge which was equal to its individually established rate from Boston to the points of destination, is altogether insufficient to make these shipments take on a purely local character over the Boston and Maine; and if the shipments were not in all essential respects local from Boston to the destination points, then they were through shipments over the through
119 line of the connecting carriers, and must be so treated. It is unnecessary to cite the various decisions which have been rendered to this effect.

It is not material in these cases whether the claimants, who are all shippers, or whether the consignees paid the transportation charges. The wrongs inflicted resulted from regulations established

by the carriers antecedent to the shipments, and the movement of the property depended upon the shipper's acceptance of conditions thus notified to him in advance. He had to regulate his price for oil accordingly. Moreover, it is part of the proof that the cost of transportation was an item of expense which was borne by the shipper and not by the consignee. That damage resulted to the claiming shippers, to the extent of the charge on the barrel package, is clearly demonstrated.

Of the various carriers named as defendants in these cases in our orders of November 14, 1892, only the Western New York and Pennsylvania and the New York, Lake Erie and Western appear to have been initial carriers of oil shipments mentioned in the claims. These roads have been in the possession of receivers and operated under the direction of United States Courts during a portion of the time properly covered by the claims. The affairs of the Western New York and Pennsylvania Railroad Company passed into the hands of Samuel G. De Coursey, as Receiver on or about April 1, 1893, and said Receiver was operating this road on May 15, 1894, when the hearing of this matter took place. The New York, Lake Erie and Western Railroad Company has been, since on or about July 26, 1893, and still is, operated by Receivers appointed and controlled by a Federal Court. The Receivers now in possession of the properties of this company are J. G. McCullough and E. B. Thomas. Receivers of railroad companies are common carriers subject to the prohibitions and requirements of, and to regulation under,
120 the provisions of the Act to Regulate Commerce, and any order entered by us requiring reparation to shippers for acts made unlawful by the statute will doubtless be promptly obeyed by the Receivers of said defendants under direction of the Courts from which, respectively, their authority to act was derived.

On July 12, 1895, counsel for defendant, the Lehigh Valley Railroad Company, suggested to the Commission, by the filing of an affidavit of John R. Fanshawe and copy of a lease of the Lehigh Valley Railroad to the Philadelphia and Reading Railroad Company, that for the period between February 11, 1892, and August 1, 1893, a portion of the time covered by these reparation claims, the Lehigh Valley Railroad Company was operated by the Philadelphia and Reading Railroad Company, as lessee, under the terms of a lease bearing the date first mentioned; and that, during such time, the receipts from the operation of the Lehigh Valley road inured to and were received by the Philadelphia and Reading Railroad Company and were not received by the defendant, the Lehigh Valley Railroad Company.

Though the Philadelphia and Reading Company as lessee would be liable for injuries inflicted during its management of the road, that company is not a party to these proceedings. It is understood that the Lehigh Valley Railroad Company resumed operation of its properties under a clause in the lease providing for its termination at the option of the lessor company, in the event of the termination, for any reason whatsoever, of a certain agreement of even date therewith between the Lehigh Valley Coal Company and the Philadelphia

and Reading Coal and Iron Company. There is thus raised in these proceedings the question whether the lessor company is liable to respond in damages to parties injured through non-performance of public duties as a common carrier during the operation of its railroad property by a lessee.

121 The lessor company has been held not liable for breaches of contract entered into by its lessee. Mahoney *vs.* Atlantic and St. Louis Railroad Company, 63 Me. 68; and other cases cited in 19 Am. and Eng. Enc. Law, 903. But Green's Brice Ultra Vires, 398, and authorities there cited, are to the effect that "A railroad cannot, by leasing its corporate property and franchises, relieve itself from liability to the public for injuries sustained and damages resulting from breach of contract or duty by the lessee."

But in our view there was no element of contract in the matters now under consideration, and whether the lessor railroad company is or is not liable for a breach of contract entered into by the lessee company affecting public interests in the operation of the road, does not touch the point in question. This defendant railroad company was engaged in carrying oil, and being so engaged, it was bound to furnish equal facilities to shippers of oil and to carry under like terms for all. The defendant company did not do this and it was not done while the lessee was operating the road. On the contrary, some shippers through unequal terms imposed, were obliged to pay more for the carriage of their oil than was exacted of competing shippers, and the only alternative possessed by those discriminated against was to go out of the business of shipping oil to points reached by the Lehigh Valley road. These shippers might, it is true, have gone to very considerable expense in supplying themselves with tank cars and thus put themselves in a position which would have enabled them to ship oil and pay only for having the oil transported; but if this could be required of them, it might, with equal justice, be held that if they did not like the regulations imposed by the Lehigh Valley and its connecting roads, their recourse was to build and operate a road of their own. The violations of law found to exist in these cases resulted from conditions of shipment and carriage antecedently imposed by the carriers, and the question does not, therefore,

122 involve consideration of the lessor company's liability for breaches of the law occasioned by the failure of the lessee carrier to observe the terms of an agreement with the shipper to which the lessor was not anywise a party.

The great weight of authorities cited in 19 Am. and Enc. Law, 889, 1 Spelling, Priv. Corp. 153, 1 Beach, Priv. Corp. 595, 1. Redf. Railways,* 636, and Thompson on Carriers, is to the effect that the lessor company remains liable for the performance of public duties, and of all acts done by the lessee in the operation of the road, notwithstanding that the lease may be authorized by the legislature. "It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees * * * The operation of the road by the lessees does not change the relations of the

original company to the public. Washington A. & G. R. Co. *vs.* Brown, 84 U. S. 17 Wall, 445, 21 L. ed. 675. This was a case where a portion of the railroad lying in the District of Columbia, was in the hands of a receiver of the lessees, and the remainder lying in Virginia was still in the hands of the lessees, the whole railroad being worked on the joint account of the lessees on the Virginia side and the receiver on the District side. Mr. Justice Davis said on the question of whether the defendant, the lessor company, was liable: "In this case the possession (of the receiver) was not exclusive, nor were the servants subject to the receiver's order alone. On the contrary, the road was run on the joint account of the lessees and receiver, and the servants employed and controlled by them jointly. Both were, therefore, alike responsible for the act complained of, and if so, *the original company* (the lessor) *is also responsible*, for the servants under such an employment, *in legal contemplation*, are as much the servants of the company as of the lessees and receiver." Wash-
123 ington A. & G. R. Co. *vs.* Brown *supra*. This case of Brown was for illegal expulsion of complainant from a passenger car. We find it cited as an authority in a number of cases treating of the lessor carrier's liability.

In Arrowsmith *vs.* Nashville & D. R. Co., 57 Fed. Rep. 171, the Court endeavored to distinguish Brown's case by holding there was no showing in the latter proceeding that the lease had been authorized. In view of the broad ruling in the Brown case that "The operation of the road by the lessees does not change the relations of the original company to the public," and that "the original company is also responsible for the servants under such an employment, in legal contemplation, are as much the servants of the company as of the lessees," we are unable to see how the fact or absence of statutory authority to make the lease can change the lessor's responsibility for the performance of public duties, unless such statutory authority contains express exemption of the lessor company. The decision in Arrowsmith's case, citing numerous authorities, is to the effect that "The duty to carry plaintiff's intestate with the highest degree of care and skill did not rest upon any charter, requirement or spring from any general statutory law of the State. The duty was imposed by operation of common law upon the contract of carriage. The right to maintain this action arises from the contract relation of carrier and passenger." But whether Brown's case was properly distinguishable or not, the Court also held in Arrowsmith's case that "Where obligations are imposed by charter or statute law upon a railroad company for the protection and advantage of the general public not having contract relations with it, it may very well be said that a general authority to lease out its road, which contains no provision exempting it from such public obligations, will not absolve it from liabiilty." Arrowsmith *vs.* Nashville & D. R. Co. *supra*.

124 We are not able to find in the statutes of Pennsylvania, New Jersey, or New York, the States through which the Lehigh Valley runs, any specific exemption of lessor railroad companies from liability for damages resulting through failure to see to

it that its public duties are performed in the operation of its line by a lessee. The conditions imposed upon shippers, which have been declared illegal in these proceedings, were established by the lessor company, and continued without change by the lessee company. The lessor's liability was asserted in these cases before it undertook to lease the road, and damages were claimed on behalf of parties injured. These cases were decided during the time the lease was in force, but neither the lessee nor the lessor company took steps to obey our order requiring the illegal discrimination to cease. The lessor resumed operation of the road some time after our decision was rendered, and at no period during the pendency of these supplementary proceedings for reparation has it undertaken to comply with that decision; on the contrary, it has persisted in keeping up the unjust discriminations and unlawful prejudices which have been so strongly condemned herein. Moreover, the lease itself contains a provision in its eleventh clause or paragraph, by which, seeming to recognize its liability as lessor for its lessee's acts, it stipulates for indemnity against all loss or damage resulting from, or occasioned by, failure or neglect of the lessee to do whatever it may lawfully be required to do in the use, management and control of the demised premises.

The Lehigh Valley Railroad Company, a common carrier subject to the provisions of the Act to Regulate Commerce, could not, by leasing its road, free itself from liabilities for practices made illegal by that statute; nor after resuming operation of its property pending proceedings against it to enforce statutory provisions so violated and to recover damages for injuries sustained under such violations, can it claim exemption from liability during the term of the lease.

Following are the names of claimants, members of the complaining associations, who served their claims upon defendant initial carriers in accordance with the stipulation entered into by counsel for claimants and defendants on May 16, 1894.

Initial carrier, Western New York and Pennsylvania.
Penn Refining Company, Limited, Oil City, Pa.
John Schwartz & Co., Titusville, Pa.
Rice & Robinson, Titusville, Pa.
Rice, Robinson & Foggan, Titusville, Pa.
Independent Refining Company, Limited, Oil City, Pa.
Genie Wood, doing business under the trade name of The Oil reek Refining Works, Titusville, Pa.
American Oil Works, Limited, Titusville, Pa.
Western Refining Company, Limited, Titusville, Pa.
S. Y. Ramage, doing business under the trade name of the Mutual il Company, Reno, Pa.
National Oil Company, Limited, Titusville, Pa.
Continental Refining Company, Limited, Oil City, Pa.
International Oil Works, Limited, Titusville, Pa.
Initial carrier, New York, Lake Erie and Western System.
A. L. Confer, doing business under the trade name of The Empire l Works, Reno, Pa.

S. Y. Ramage, doing business under the trade name of The Mutual Oil Company, Reno, Pa.

Penn Refining Company, Limited, Oil City, Pa.

Independent Refining Company, Limited, Oil City, Pa.

In accordance with the above stated rulings and principles, we make the following findings and orders upon claims filed and served covering shipments of petroleum oil in barrels to New York
126 and New York harbor points and Boston and points taking Boston rates, and which, between the 3rd day of September, 1888, and the 15th day of May, 1894, were delivered by claiming shippers to the Western New York and Pennsylvania Railroad Company or its Receiver for transportation to said destinations:

Claim of the Penn Refining Company, Limited, Oil City, Pa.

The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of eight thousand, five hundred and seventy-nine dollars ($8,579.00) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad from Oil City, Pa., to Perth Amboy, N. J., which said shipment- of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York & Pennsylvania Railroad Company and its said receiver; and the said Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of eight thousand, five hundred and seventy-nine dollars ($8,579.00) together with interest thereon at the rate of six per cent. per annum from May 15, 1894.

127 The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of three hundred and ten dollars and ten cents ($310.10) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the Delaware, Lackawanna & Western Railroad from Oil City, Pa., to Hoboken, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th

day of May, 1894, as appears from claim filed and statement thereon made by said Western New York & Pennsylvania Railroad Company and its said receiver; and the said Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of three hundred and ten dollars and ten cents ($310.10), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie & Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, and the defendant, the Delaware & Hudson Canal Company, the sum of three hundred and forty-three dollars and fifty-eight cents ($343.58) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in
128 barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York, Lake Erie and Western Railroad, the Delaware and Hudson Canal Co.'s Railroad, and the Central Railroad of New Jersey from Oil City, Pa., to Newark, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof, and the Delaware and Hudson Canal Company are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of three hundred and forty-three dollars and fifty-eight cents ($343.58), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

Claim of John Schwartz & Co., Titusville, Pa.

The claimants, John Schwartz & Co., of Titusville, Pa., are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of five hundred and fifty-eight dollars and twenty-two cents ($558.22) as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimants to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the Delaware, Lacka-

wanna and Western Railroad from Titusville, Pa., to Hobo-
129 ken, N. J., which said shipments of oil in barrels were so transported over the said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimants, John Schwartz & Company, the said sum of five hundred and fifty-eight dollars and twenty-two cents ($558.22), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimants, John Sch-artz & Company of Titusville, Pa., are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, the sum of fifty-eight dollars and eighteen cents ($58.18) as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimants to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the New York, Lake Erie and Western Railroad from Titusville, Pa., to New York and Brooklyn, N. Y., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the New York, Lake
Erie and Western Railroad Company and J. G. McCullough
130 and E. B. Thomas, the receivers thereof, are hereby ordered and required to pay to the claimants, John Schwartz & Company, the said sum of fifty-eight dollars and eighteen cents ($58.18), together with interest thereon at the rate of six per cent. per annum from May 15, 1894.

The claimants, John Schwartz & Company, of Titusville, Pa., are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of ten dollars and sixteen cents ($10.16) as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimants to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the West Shore Railroad from Titusville, Pa., to Weehawken, N. J., which said shipments of oil in barrels were so transported over the said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed

and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimants, John Schwartz & Company, the sum of ten dollars and sixteen cents ($10.16), together with interest thereon at the rate of six per cent. per annum from May 15, 1894.

The claimants, John Schwartz & Company, of Titusville, Pa., are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of seven hundred and eighty-seven dollars and twenty cents ($787.20) as reparation for damage resulting to claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered
131 by said claimants to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York Central and Hudson River Railroad and connecting railroads from Titusville, Pa., to Pittsfield, Mass., Springfield, Mass., Holyoke, Mass., and Brattleboro, Vt., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statements thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimants, John Schwarts & Company, the said sum of seven hundred and eighty-seven dollars and twenty cents ($787.20), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimants, John Schwartz & Company, of Titusville, Pa., are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of seven thousand three hundred and ten dollars and ninety-seven cents ($7,310.97) as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimants to said Western New York and Pennsylvania Railroad Company or to its said receiver for transpor-tion over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Titusville, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd of September, 1888, and the 15th day of May,
1894, as appears from claim filed and statement thereon
132 made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimants, John Schwartz & Company, the said sum of seven thousand three hun-

dred and ten dollars and ninety-seven cents ($7,310.97), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

Claim of Rice & Robinson, of Titusville, Pa.

The claimants, Reuben L. Rice and Joseph C. Robinson, as members of the firm of Rice and Robinson and as successors of the firm of Rice, Robinson & Witherop, are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of five thousand one hundred and ninety-two dollars and fifty-nine cents ($5,192.59) as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said firms to said Western New York and Pennsylvania Railroad Company, or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Titusville, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 1st day of November, 1890, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and re-
133 quired to pay to said claimants, Rice and Robinson, the said sum of five thousand one hundred and ninety-two dollars and fifty-nine cents ($5,192.59), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimants, Reuben L. Rice and J. C. Robinson, as members of the firm of Rice & Robinson and as successors of the firm of Rice, Robinson & Witherop, are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, the sum of sixty-five dollars and eighteen cents ($65.18) as reparation for damage resulting to said claimants from excesive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said firms to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the Delaware, Lackawanna and Western Railroad from Titusville, Pa., to Hoboken, N. J., which said shipments of oil in barrels, were so transported over said railroads between the 3rd day of September, 1888, and the 1st day of November, 1890, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and the said Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to said claimants, Rice & Robinson, the said sum of sixty-five

dollars and eighteen cents ($65.18), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimants, Reuben L. Rice and Joseph C. Robinson, as members of the firm of Rice and Robinson and as successors of the firm of Rice, Robinson & Witherop, are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and
134 the defendant, the Fitchburg Railroad Company, and the defendant, the Boston and Maine Railroad Company, the sum of four hundred and ninety-five dollars and sixteen cents ($495.16) as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said firms to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, the Fitchburg Railroad, and the Boston and Maine Railroad from Titusville, Pa., to Portland, Me., and other points to which the same transportation rates were applied, which said shipment of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 1st day of November, 1890, as it appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company and the Boston and Maine Railroad Company are hereby ordered and required to pay to said claimants, Rice & Robinson, the said sum of four hundred and ninety-five dollars and sixteen cents ($495.16), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimants, Reuben L. Rice and Joseph C. Robinson, as members of the firm of Rice & Robinson and as successors of the firm of Rice, Robinson & Witherop, are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company, the sum of two hundred and eleven dollars and twenty cents ($211.20) as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered
135 by said firms to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad and the Fitchburg Railroad from Titusville, Pa., to Boston, Mass., and other points to which the same transportation rates were applied, which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 1st day of November, 1890, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and the Fitchburg Railroad Company are hereby ordered and required to

pay to said claimants, Rice & Robinson, the said sum of two hundred and eleven dollars and twenty cents ($211.20), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimants, Reuben L. Rice and Joseph C. Robinson, as members of the firm of Rice & Robinson, and as successors of the firm of Rice, Robinson & Witherop, are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of one hundred and fifteen dollars and fifty-four cents ($115.54) as reparation for damages resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said firms to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the New York Central and Hudson River Railroad from Titusville, Pa., to Boston, Mass., or points to which the same transportation rates were applied, which said shipments of oil were so transported over said railroads between the 3rd day of September, 1888, and the 1st day of November, 1890, as appears from claim
136 filed and statement thereon made by the said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to said claimants, Rice & Robinson, the said sum of one hundred and fifteen dollars and fifty-four cents ($115.54), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

Claim of Rice, Robinson & Foggan, Titusville, Pa.

The claimants, Rice, Robinson & Foggan, of Titusville, Pa., are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of five thousand, five hundred dollars and eighty-seven cents ($5,500.87), as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimants to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Titusville, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 1st day of November, 1890 and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimants, Rice, Robinson & Foggan, the said

sum of five thousand five hundred dollars and eighty-seven cents ($5,500.87), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

137 The claimants, Rice, Robinson & Foggan, of Titusville, Pa., are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of sixty-seven dollars and thirty-seven cents, ($67.37) as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimants to said Western New York and Pennsylvania Railroad or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Delaware, Lackawanna and Western Railroad from Titusville, Pa., to Hoboken, N. J., which said shipments of oil in barrels were so transported over said railroads between the 1st day of November, 1890, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimants, Rice, Robinson & Foggan, the said sum of sixty-seven dollars and thirty-seven cents ($67.37) together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimants, Rice, Robinson & Foggan, of Titusville, Pa., are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, the sum of one hundred and twelve dollars and one cent ($112.01) as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon the shipments of petroleum oil in barrels delivered by said claimants to said Western New York and Pennsylvania Railroad

138 Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, and the Fitchburg Railroad from Titusville, Pa., to Boston, Mass., or other points to which the same transportation rates were applied, which said shipments of oil in barrels were so transported over said railroads between the 1st day of November, 1890, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver, and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company are hereby ordered and required to pay to the claimants, Rice, Robinson & Foggan, the said sum of one hundred and twelve dollars and one cent ($112.01) together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimants, Rice, Robinson & Foggan, of Titusville, Pa., are entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the

receiver thereof the sum of one hundred and sixty-one dollars and ninety cents ($161.90) as reparation for damages resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimants to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York Central and Hudson River Railroad and connecting railroads from Titusville, Pa., to Boston, Mass., or other points to which the same transportation rates were applied, which said shipments of oil in barrels were so transported over said railroads between the 1st day of November, 1890, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and
139 Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimants, Rice, Robinson and Foggan, the said sum of one hundred and sixty-one dollars and ninety cents ($161.90), together with interest thereon at the rate of 6 per cent. per annum from May 15th, 1894.

Claim of the Independent Refining Company, Limited, Oil City, Pa.

The claimant, the Independent Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, and the defendant, the Boston and Maine Railroad Company, the sum of twenty-six dollars and seventy-four cents ($26.74) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, the Fitchburg Railroad, and the Boston and Maine Railroad from Oil City, Pa., to Haverhill, Mass., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the Fitchburg Railroad Company, and the Boston and Maine Railroad Company are hereby ordered and required to pay to the claimant, the Independent Refining
140 Company, Limited, the said sum of twenty-six dollars and seventy-four cents ($26.74), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Independent Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De

Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, the sum of nine hundred and thirty-six dollars and eighteen cents ($936.18) as reparation for damage resulting to said claimant for excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, and the Fitchburg Railroad from Oil City, Pa., to Boston, Mass., and other points to which the same transportation rates were applied, which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company, are hereby ordered and required to pay the claimant, the Independent Refining Company, Limited, the said sum of nine hundred and thirty-six dollars and eighteen cents ($936.18), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Independent Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh
141 Valley Railroad Company, the sum of six thousand and fifty-one dollars and forty-seven cents ($6,051.47) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimants to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Oil City, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by the said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Independent Refining Company, Limited, the said sum of six thousand and fifty-one dollars and forty-seven cents ($6,051.47), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Independent Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company, the sum of two hundred and sixty-three dollars and thirty-four cents ($263.34) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted

upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Oil City, Pa., to New York, N. Y., Communipaw, N. J., and
142 Jersey City, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver, and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Independent Refining Company, Limited, the said sum of two hundred and sixty-three dollars and thirty-four cents ($263.34), together with interest thereon, at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Independent Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, and the defendant, the Delaware and Hudson Canal Company, the sum of seven dollars and nineteen cents ($7.19) as reparation for damage resulting to said claimant for excessive and unlawful transportation charges exacted upon a shipment of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York, Lake Erie and Western Railroad, the Delaware and Hudson Canal Company's Railroad, and the Central Railroad of New Jersey from Oil City, Pa., to Newark, N. J., which said shipment of oil in barrels was so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver, and the said Western New York
143 and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, and the Delaware and Hudson Canal Company are hereby ordered and required to pay to the claimant, the Independent Refining Company, Limited, the said sum of seven dollars and nineteen cents ($7.19), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Independent Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of ninety-two dollars and fifty-nine cents ($92.59) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges ex-

acted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, the New York, Ontario and Western Railway and the Central Railroad of New Jersey from Oil City, Pa., to Constable Hook, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the Independent Refining Company, Limited, the said sum of ninety-two dollars and fifty-nine cents ($92.59), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

144 *Claim of Genie Wood, Doing Business under the Trade Name of the Oil Creek Refining Works, Titusville, Pa.*

The claimant, Genie Wood, of Titusville, Pa., doing business under the trade name of the Oil Creek Refining Works, is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant the Lehigh Valley Railroad Company, the sum of two thousand seven hundred and sixteen dollars and fifty-one cents ($2,716.51) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimants to said Western New York and Pennsylvania Railroad Company, or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Titusville, Pa., to Perth Amboy, N. J., which said shipments of oil were so transported over the said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, Genie Wood, doing business under the trade name of the Oil Creek Refining works, the said sum of two thousand seven hundred and sixteen dollars and fifty-one cents ($2,716.51), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

145 The claimant, Genie Wood, of Titusville, Pa., doing business under the trade name of the Oil Creek Refining Works, is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of ninety-six dollars and thirty-two cents ($96.32) for damage resulting to said claim-

ant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or its said receiver, for transportation over the said Western New York and Pennsylvania Railroad and the West Shore Railroad from Titusville, Pa., to New York, N. Y., which said shipments of oil in barrels were so transported over said roads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay the claimant, Genie Wood, doing business under the trade name of the Oil Creek Refining Works, the said sum of ninety-six dollars and thirty-two cents ($96.32), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, Genie Wood, of Titusville, Pa., doing business under the trade name of the Oil Creek Refining Works, is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of thirty-six dollars and twenty-eight cents ($36.28) as reparation for damage resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Delaware, Lackawanna and Western Railroad from Titusville, Pa., to New York, N. Y.,
146 which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey the receiver thereof, are hereby ordered and required to pay to the claimant, Genie Wood, doing business under the trade name of the Oil Creek Refining Works, the said sum of thirty-six dollars and twenty-eight cents ($36.28) together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, Genie Wood, of Titusville, Pa., doing business under the trade name of the Oil Creek Refining Works, is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, the sum of ten dollars and ninety-nine cents ($10.99) as reparation for damages resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said

claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York, Lake Erie and Western Railroad and connecting railroads from Titusville, Pa., to Providence, Rhode Island, which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad and its said receiver; and the said Western New York and Pennsylvania Railroad Company and
147 Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, are hereby ordered and required to pay to the claimant, Genie Wood, doing business under the trade name of the Oil Creek Refining Works, the said sum of ten dollars and ninety-nine cents ($10.99), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, Genie Wood, of Titusville, Pa., doing business under the trade name of the Oil Creek Refining Works, is entitled to recover from the defendants, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of eleven dollars and twenty cents ($11.20), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad, the New York Central and Hudson River Railroad and connecting railroads from Titusville, Pa., to Millington, Mass., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the said claimant, Genie Wood, doing business under the trade name of the Oil Creek Refining Works, the said sum of eleven dollars and twenty cents ($11.20), with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

148 *Claim of the American Oil Works, Limited, Titusville, Pa.*

The claimant, the American Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, and the defendant, the Boston and Maine Railroad Company, the sum of two hundred and fifty-four dollars and forty-eight cents ($254.48), as reparation for damage, resulting to said

claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, the Fitchburg Railroad and the Boston and Maine Railroad from Titusville, Pa., to Concord, N. H., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Companny and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company, and the Boston & Maine Railroad Company are hereby ordered and required to pay to the claimant, the American Oil Works, Limited, the said sum of two hundred and fifty-four dollars and forty-eight cents ($254.48), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the American Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G.
149 De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, the sum of five hundred and twenty-six dollars and eighteen cents ($526.18) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad and the Fitchburg Railroad from Titusville, Pa., to Northampton, Greenfield and Boston, Massachusetts, which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company, are hereby ordered and required to pay to the claimant, the American Oil Works, Limited, the said sum of five hundred and twenty-six dollars and eighteen cents ($526.18), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the American Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of one hundred and eighty dollars and seventy-six cents ($180.76) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Penn-

sylvania Railroad and the West Shore Railroad from Titusville, Pa., to New York, N. Y., and Weehawken, N. J., which said shipments of oil in barrels were so transported over said railroads
150 between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the American Oil Works, Limited, the said sum of one hundred and eighty dollars and seventy-six cents ($180.76), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant the American Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof, the sum of two hundred and six dollars and fourteen cents ($206.14) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York, Lake Erie and Western Railroad and connecting railroads from Titusville, Pa., to East Boston, Mass., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, are hereby
151 ordered and required to pay to the claimant, the American Oil Works, Limited, the said sum of two hundred and six dollars and fourteen cents ($206.14), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the American Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, the sum of two hundred and sixty-nine dollars and eighty-three cents ($269.83), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, the Fitchburg Railroad, and the Providence and Worcester Railroad

from Titusville, Pa., to Providence, R. I., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver, and the Fitchburg Railroad Company are hereby ordered and required to pay to the claimant, the American Oil Works, Limited, the said sum of two hundred and fifty-nine dollars and eighty-three cents ($259.83), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the American Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western
152 New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof, the sum of fifty six dollars and fifty-five cents ($56.55), as reparation for damage resulting to said claimant from extensive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the New York, Lake Erie and Western Railroad from Titusville, Pa., to Jersey City, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, are hereby ordered and required to pay to the claimant, the American Oil Works, Limited, the said sum of fifty-six dollars and fifty-five cents ($56.55), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the American Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof, and the defendant, the Delaware and Hudson Canal Company, and the defendant, the Fitchburg Railroad Company, the sum of ten dollars and fifty-eight cents
153 ($10.58) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York, Lake Erie and Western Rail-

road, the Delaware and Hudson Canal Company's Railroad and the Fitchburg Railroad from Titusville, Pa., to Southbridge, Mass., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, and the Delaware and Hudson Canal Company and the Fitchburg Railroad Company are hereby ordered and required to pay to the claimant, the American Oil Works, Limited, the said sum of ten dollars and fifty-eight cents ($10.58), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the American Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of three hundred and seven dollars and forty-nine cents ($307.49) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over
154 the Western New York and Pennsylvania Railroad and the New York Central and Hudson River Railroad and connecting railroads from Titusville, Pa., to Norwalk, Conn., Springfield, Mass., North Adams, Mass., Simsbury, Conn., Cambridge Junction, Vt., Putnam, Conn., and other points in New England to which the transportation rate in force to Boston was applied, which said shipment of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company, and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the American Oil Works, Limited, the said sum of three hundred and seven dollars and forty-nine cents ($307.49), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the American Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of four thousand four hundred and eighty-nine dollars and thirty-one cents ($4,489.31) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over

the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Titusville, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad
155 Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the American Oil Works, Limited, the said sum of four thousand four hundred and eighty-nine dollars and thirty-one cents ($4,489.31), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the American Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of two hundred and twenty-four dollars and thirty-seven cents ($224.37), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Delaware, Lackawanna and Western Railroad from Titusville, Pa., to Hoboken, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the American Oil Works, Limited, the said sum of two hundred twenty-four dollars and thirty-seven cents ($224.37), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

156 *Claim of the Western Refining Company, Limited, Titusville, Pa.*

The claimant, the Western Refining Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of one hundred and fifty-four dollars and seventy cents ($154.70) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania railroad and the West Shore Railroad from Titusville, Pa., to New York, N. Y.,

which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the Western Refining Company, Limited, the said sum of one hundred and fifty-four dollars and seventy cents ($154.70), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Western Refining Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, and the defendant,
157 the Delaware and Hudson Canal Company, the sum of thirty-six dollars and two cents ($36.02) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York, Lake Erie and Western Railroad, and the Central Railroad of New Jersey from Titusville, Pa., to Brills, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, and the Delaware and Hudson Canal Company are hereby ordered and required to pay to the claimant, the Western Refining Company, Limited, the said sum of thirty-six dollars and two cents ($36.02), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Western Refining Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of fifty-five dollars and seventy-nine cents ($55.79), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipment of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Delaware, Lackawanna and Western Railroad from Titusville, Pa., to New
158 York, N. Y., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of Sep-

tember, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, Western Refining Company, Limited, the sum of fifty-five dollars and seventy-nine cents ($55.79), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Western Refining Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of one thousand three hundred and eighty-three dollars ($1,383) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Titusville, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Western Refining
Company, Limited, the said sum of one thousand three hun-
159 dred and eighty-three dollars ($1,383), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Western Refining Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, the sum of eighty-two dollars and eighty-six cents ($82.86) as reparation for damages resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the New York Central and Hudson River Railroad and connecting railroads from Titusville, Pa., to Providence, R. I., and Hartford, Conn., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the Western

Refining Company, Limited, the said sum of eighty-two dollars and eighty-six cents ($82.86), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

Claim of S. Y. Ramage, Doing Business under the Trade Name of the Mutual Oil Company, Reno, Pa.

The claimant, S. Y. Ramage, of Reno, Pa., doing business under the trade name of the Mutual Oil Company, is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the
160 sum of one hundred and thirty-eight dollars and fifty-two cents ($138.52), as reparation for damages resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Reno, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, S. Y. Ramage, doing business under the trade name of the Mutual Oil Company, the said sum of one hundred and thirty-eight dollars and fifty-two cents ($138.52), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

Claim of the National Oil Company, Limited, Titusville, Pa.

The claimant, the National Oil Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of three hundred and forty dollars and twenty-five cents ($340.25), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company, or to its said receiver, for trans-
161 portation over the Western New York and Pennsylvania Railroad, and the New York Central and Hudson River Railroad and connecting railroads from Titusville, Pa., to points in New England to which the transportation rate in force to Boston was applied, which said shipments of oil in barrels were so transported over the said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and

statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the National Oil Company, Limited, the said sum of three hundred and forty dollars and twenty-five cents ($340.25), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the National Oil Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant the Fitchburg Railroad Company, the sum of ninety-one dollars and twenty-three cents ($91.23) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, the Fitchburg Railroad and the Concord and Montreal Railroad from Titusville, Pa., to points in New England to which the transportation rate in force to Boston was applied, which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York
162 and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company are hereby ordered and required to pay to the claimant, the National Oil Company, Limited, the said sum of ninety-one dollars and twenty-three cents ($91.23) together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the National Oil Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, the sum of two hundred and seven dollars and thirty-seven cents ($207.37) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad and the Fitchburg Railroad from Titusville, Pa., to points in New England to which the transportation rate in force to Boston was applied, which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsyl-

vania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company, are hereby ordered and required to pay to the claimant, the National Oil Company, Limited, the said sum of two hundred and seven dollars and thirty-seven cents ($207.37), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

163 The claimant, the National Oil Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, and the defendant, the Boston and Maine Railroad Company, the sum of one hundred and twelve dollars and seventy-seven cents ($112.77) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, the Fitchburg Railroad and the Boston and Maine Railroad from Titusville, Pa., to points on the Boston and Maine Railroad to which the transportation rate in force to Boston was applied, which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the Fitchburg Railroad Company and the Boston and Maine Railroad Company are hereby ordered and required to pay to the claimant, the National Oil Company, Limited, the said sum of one hundred and twelve dollars and seventy-seven cents ($112.77), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the National Oil Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, receivers thereof, the sum of four hundred

164 and seventy-four dollars and forty-two cents ($474.42), as reparation for damages resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of *of* petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York, Lake Erie and Western Railroad and the New York and New England Railroad from Titusville, Pa., to points in New England to which the transportation rate in force to Boston was applied, which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from

claim filed and statement thereon made by said Western New York and Pennsylvania Railroad and its said receiver; and the said Western New York and Pennsylvania railroad Company and Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, are hereby ordered and required to pay to the claimant, the National Oil Company, Limited, the said sum of four hundred and seventy-four dollars and forty-two cents ($474.42), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the National Oil Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of sixty-six dollars and ninety-one cents ($66.91), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York
165 and Pennsylvania Railroad, the West Shore Railroad and the New York and New England Railroad from Titusville, Pa., to points in New England to which the transportation rate in force to Boston was applied, which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the National Oil Company, Limited, the said sum of sixty-six dollars and ninety-one cents ($66.91), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the National Oil Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of two thousand seven hundred and seventy-four dollars and ninety-seven cents ($2,774.97), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, and the Lehigh Valley Railroad from Titusville, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad and its said receiver; and the said Western New York and

Pennsylvania Railroad Company and Samuel G. De Coursey,
166 the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the National Oil Company, Limited, the said sum of two thousand seven hundred and seventy-four dollars and ninety-seven cents ($2,774.97), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the National Oil Company, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof, the sum of seventy-two dollars and two cents ($72.02), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, and the New York, Lake Erie and Western Railroad from Titusville, Pa., to Jersey City, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appeared from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, are hereby ordered and required to pay to the claimant, the National Oil Company, Limited, the said sum of seventy-two dollars and two cents ($72.02), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

167 *Claim of the Continental Refining Company, Oil City, Pa.*

The claimant, the Continental Refining Company, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, the sum of sixty-two dollars and seventy-six cents, ($62.76) as reparation for damages resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, the Fitchburg Railroad and the Concord and Montreal Railroad from Oil City, Pa., to Lebanon and Enfield, N. H., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York

and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company, are hereby ordered and required to pay to the claimant, the Continental Refining Company, the said sum of sixty-two dollars and seventy-six cents ($62.76), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Continental Refining Company, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of one hundred and sixty-seven dollars and thirty-four cents ($167.34), as reparation
168 for damages resulting to said claimant from excessive and unlawful transportation charges upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company, or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad, and the New York Central and Hudson River Railroad and connecting railroads from Oil City, Pa., to Boston and Claremont, Mass., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the Continental Refining Company, the said sum of one hundred and sixty-seven dollars and thirty-four cents ($167.34), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Continental Refining Company, of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, the sum of nineteen dollars and seventy-three cents ($19.73) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company or its said receiver for transportation over the Western New York & Pennsylvania Railroad, the West Shore Railroad and the Fitchburg Railroad from Oil City, Pa., to Exeter, N. H., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as
169 appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company are hereby ordered and required to pay to the complainant, the Continental Refining Company, the said sum of nineteen dollars and seventy-

three cents ($19.73), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Continental Refining Company, of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie & Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof, and the defendant, the Delaware & Hudson Canal Company, the sum of two hundred and sixty-three dollars and one cent ($263.01) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company, or to its receiver, for transportation over the Western New York & Pennsylvania Railroad, the New York, Lake Erie & Western Railroad, the Delaware & Hudson Canal Company's Railroad and the Central Railroad of New Jersey from Oil City, Pa., to Newark, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York & Pennsylvania Railroad Company and its said receiver; and the said Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof,
170 and the New York, Lake Erie & Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, and the Delaware & Hudson Canal Company are hereby ordered and required to pay to the claimant, the Continental Refining Company, the said sum of two hundred and sixty-three dollars and one cent ($263.01), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Continental Refining Company, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of two thousand, three hundred and ninety-seven dollars and one cent ($2,397.01) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said complainant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley railroad from Oil City, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Continental Refining Company, the said sum of two thousand three

hundred and ninety-seven dollars and one cent ($2,397.01), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the Continental Refining Company, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G.
171 De Coursey, the receiver thereof, the sum of thirty dollars and eighty-nine cents ($30.89), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad and the New York and New England Railroad from Oil City, Pa., to Norfolk, Conn., and other points to which the transportation rate in force to Boston was applied, which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the Continental Refining Company, the said sum of thirty dollars and eighty-nine cents ($30.89), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

Claim of the International Oil Works, Limited, Titusville, Pa.

The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of eight thousand, three hundred and thirty-three dollars and thirty-six cents ($8,333.36), as reparation for damage resulting to said claimant from excess and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New
172 York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Titusville, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of eight thousand, three hundred and thirty-three dollars and thirty-

six cents ($8,333.36), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of fifty-one dollars and twenty cents ($51.20), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad from Titusville, Pa., to Jersey City, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company
173 and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of fifty-one dollars and twenty cents ($51.20), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of three hundred and seventy-six dollars and forty-six cents ($376.46), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company, or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad, and the Delaware, Lackawanna and Western Railroad from Titusville, Pa., to Hoboken, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of three hundred and seventy-six dollars and forty-six cents ($376.46), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De

Coursey, the receiver thereof, the sum of forty-three dollars
174 and thirty-seven cents ($43.37), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, the New York, Ontario and Western Railway and the Central Railroad of New Jersey from Titusville, Pa., to Constable Hook, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by the said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of forty-three dollars and thirty-seven cents ($43.37), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of eight dollars and sixty-seven cents ($8.67), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company, or to its said receiver, for transportation over the Western New York and Pennsylvania Railroad and the West Shore Railroad from Titusville, Pa., to Weehawken, N. J., which said shipments of oil in barrels were so transported over the railroads between the 3rd day of
September, 1888, and the 15th day of May, 1894, as appears
175 from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of eight dollars and sixty-seven cents ($8.67), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, the sum of eleven dollars and nineteen cents ($11.19), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver, for transportation over the Western New York and Pennsylvania

Railroad, the West Shore Railroad, the Fitchburg Railroad and the New York Providence and Boston Railroad from Titusville, Pa., to Woonsocket, R. I., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company, are hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of eleven dollars and nineteen cents ($11.19) together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

176 The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of eleven dollars and eleven cents ($11.11) as reparation for damage resulting to *to* said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, and the New York Central and Hudson River Railroad, from Titusville, Pa., to New York, N. Y., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of eleven dollars and eleven cents ($11.11), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, the sum of five hundred and fifty-one dollars and ten cents ($551.10) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York

177 and Pennsylvania Railroad, the West Shore Railroad, and the Fitchburg Railroad from Titusville, Pa., to Boston, Mass., and other New England points to which the transportation rate in force to Boston, was applied, which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and

Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company are hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of five hundred and fifty-one dollars and ten cents ($551.10), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of one thousand and twenty-seven dollars and forty-nine cents ($1,027.49) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad and the New York Central and Hudson River Railroad and connecting railroads to Boston, Mass., and other New England points to which the transportation rate in force to Boston was applied, which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said
178 Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and said Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of one thousand and twenty-seven dollars and forty-nine cents ($1027.49), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Fitchburg Railroad Company, the sum of eight hundred and four dollars and eighty-seven cents ($804.87) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, the Fitchburg Railroad and the Concord and Montreal Railroad from Titusville, Pa., to Concord, N. H., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Fitchburg Railroad Company are

hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of eight hundred and four dollars and eighty-seven cents ($804.87), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

179 The claimant, the International Oil Works, Limited, of Titusville, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, the sum of nine dollars and eleven cents ($9.11) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the West Shore Railroad, and the New York & New England Railroad from Titusville, Pa., to Danielsonville, Conn., which said shipments, of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, are hereby ordered and required to pay to the claimant, the International Oil Works, Limited, the said sum of nine dollars and eleven cents ($9.11), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The defendant, the New York, Lake Erie and Western Railroad Company and its receivers, J. G. McCullough and E. B. Thomas, have failed to check the claims served upon them by claimants herein, pursuant to the stipulation made in open session of the Commission at Titusville on May 16, 1894, or to make and file any statement with the Commission in regard hereto. This railroad system was the initial carrier of shipments described in the claims so served, and in the absence of information concerning the rates charged and routing taken by the shipments, which could only be furnished by said New York, Lake Erie and Western Railroad Company

180 and its receivers, and in consequence of their default in regard to said stipulation, our findings and orders as to said claims must be based upon what is set forth in claims on file, and served as aforesaid, and said New York, Lake Erie and Western Railroad Company and its receivers must be required to pay the amounts herein awarded on said claims to the several claimants found entitled thereto.

Claim of A. L. Confer, Doing Business under the Trade Name of the Empire Oil Works, Reno, Pa.

The claimant, A. L. Confer, of Reno, Pa., doing business under the trade name of the Empire Oil Works, is entitled to recover from the defendant, the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof,

the sum of one thousand, nine hundred and forty-three dollars and eighty-seven cents ($1943.87) as reparation for damages resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said New York, Lake Erie and Western Railroad Company, or to its receivers, for transportation over roads operated by said railroad company or its receivers, or over said roads and railroads connecting therewith, which said shipments of petroleum oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears by claim on file and claim forwarded by said claimant on January 31, 1895, to George G. Cochran, General Traffic Manager, New York, Lake Erie and Western Railroad system of New York City, N. Y., that is to say, the sum of one thousand, four hundred and eighty-nine dollars and twenty-one cents ($1,489.21) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Perth Amboy, N. J., from September 20, 1888, to December 27, 1893; the sum of two
181 hundred and four dollars and seventy-six cents ($204.76) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to New York, N. Y., from November 1, 1888, to July 3, 1893; the sum of fifty-five dollars and thirty cents ($55.30) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Jersey City, N. J., from April 5, 1890, to November 21, 1893; the sum of eight dollars and forty cents ($8.40) for excessive and unlawful transportation charges on a shipment of Petroleum oil in barrels by said claimant from Reno, Pa., to Elizabethport, N. J., on or about February 27, 1889; the sum of twenty-four dollars ($24) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Providence, R. I., from May 10, 1890, to September 6, 1890; the sum of fourteen dollars ($14) for excessive and unlawful transportation charges on a shipment of petroleum oil in barrels by said claimant from Reno, Pa., to Boston, Mass., on or about March 25, 1889; the sum of one hundred and twenty-five dollars and forty cents ($125.40) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to North Adams, Mass., from September 27, 1893, to February 26, 1894; the sum of twenty-two dollars and eighty cents ($22.80) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Bellows Falls, Vt., and Keene, N. H., on or about March 7, 1894. And the said New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof, are hereby ordered and required to pay to the claimant, A. L. Confer, doing business under the trade name of the Empire Oil Works, the aforesaid sums, amounting in all to the first mentioned sum of one thousand, nine hundred and forty-
182 three dollars and eighty-seven cents ($1,943.87), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

Claim of the Penn Refining Company, Limited, of Oil City, Pa.

The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof, the sum of one thousand, two hundred and seventy-three dollars and eighty cents ($1,273.80), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said New York, Lake Erie and Western Railroad Company or to its receivers, for transportation over roads operated by said railroad company or its receivers, or over said roads and railroads connecting therewith, which said shipments of petroleum oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears by claim on file and claim served September 7, 1894, by said claimant, on D. W. Guernsey, agent, New York, Lake Erie and Western Railroad system, that is to say, the sum of one hundred and forty dollars ($140) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to Jersey City, N. J., from September 18, 1888, to May 9, 1889; the sum of seven hundred and fifty-three dollars and twenty cents ($753.20), for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to Perth Amboy, N. J., from October 6th, 1888, to November 1, 1890; the sum of twenty-five dollars and twenty cents ($25.20), for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to New York, N. Y., on or about October 8, 1888, the sum of twenty-two dollars and forty cents ($22.40) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to Elizabethport, N. J., on or about December 7, 1888; the sum of seventy-eight dollars and forty cents ($78.40) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to Newark and Brills Station, N. J., from October 4, 1890, to September 19, 1893; the sum of one hundred and thirty-six dollars and eighty cents ($136.80) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to Providence, R. I., from October 12, 1889, to November 16, 1889; the sum of thirty dollars and forty cents ($30.40) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to Quidnick, R. I., on or about October 12, 1889; the sum of fifteen dollars and twenty cents ($15.20) for excessive and unlawful transportation charges on a shipment of petroleum oil in barrels by said claimant from Oil City, Pa., to Holyoke, Mass., on or about October 12, 1889; the sum of forty-one dollars and eighty cents ($41.80) for excessive and unlawful transportation charges on ship-

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ments of petroleum oil in barrels by said claimant from Oil City, Pa., to Fall River, Mass., from October 25, 1889, to March 8, 1890; the sum of fifteen dollars and twenty cents ($15.20) for excessive and unlawful transportation charges on a shipment of petroleum oil in barrels by said claimant from Oil City, Pa., to Boston, Mass., on or about October 26, 1889; the sum of fifteen dollars and twenty cents ($15.20) for excessive and unlawful transportation charges on a shipment of petroleum oil in barrels by said claimant from Oil City, Pa., to Portland, Me., on or about November 6, 1889. And the said New York, Lake Erie and Western Railroad Company and J. G.
184 McCullough and E. B. Thomas, the receivers thereof, are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the aforesaid sums, amounting in all to the first mentioned sum of one thousand, two hundred and seventy-three dollars and eighty cents ($1,273.80), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

Claim of the Independent Refining Company, Oil City, Pa.

The claimant, the Independent Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof, the sum of seven hundred and two dollars and forty-eight cents ($702.48) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said New York, Lake Erie and Western Railroad Company, or to its receivers, for transportation over roads operated by said railroad company, or its receivers, or over said roads and railroads connecting therewith, which said shipments of petroleum oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears by claim on file and claim forwarded by counsel for said claimant on or about August 1, 1895, to H. Schoonmaker, counsel, New York, Lake Erie and Western Railroad system, at New York City, N. Y., that is to say, the sum of six hundred and thirty dollars and twenty-eight cents ($630.28) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to Perth Amboy, N. J., from September 13, 1888, to February 29, 1892, the sum of twenty-four dollars ($24.00) for excessive and un-
185 lawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to Boston, Mass., on or about October 2, and October 4, 1889, the sum of twenty-four dollars ($24.00) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to Lawrence, Mass., from January 27, 1889, to April 30, 1889; the sum of twenty-four dollars and twenty cents ($24.20) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Oil City, Pa., to Bellows Falls, Vt., from July 5, 1889, to November 28, 1890.

And the said New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, are hereby ordered and required to pay to the claimant, the Independent Refining Company, Limited, the aforesaid sums, amounting in all to the first mentioned sum of seven hundred and two dollars and forty-eight cents ($702.48), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

Claim of S. Y. Ramage, Doing Business under the Trade Name of the Mutual Oil Company, Reno, Pa.

The claimant, S. Y. Ramage, of Reno, Pa., doing business under the trade name of the Mutual Oil Company, is entitled to recover from the defendant, the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, the sum of fourteen thousand, two hundred and sixty-one dollars and forty-two cents ($14,261.42) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said New York,
186 Lake Erie and Western Railroad Company or its receivers, for transportation over roads operated by said railroad company or its receivers or over said roads and railroads connecting therewith, which said shipments of petroleum oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears by claim on file and claim forwarded by said claimant on December 27, 1894, to H. Schoonmaker, counsel, New York, Lake Erie and Western Railroad system, New York city, N. Y., that is to say: The sum of twelve thousand, seven hundred and twenty-four dollars and sixty cents ($12,724.60) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimants from Reno, Pa., to Perth Amboy, N. J., from September 18, 1888, to February 13, 1891; the sum of eighty-four dollars ($84.00) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Elizabethport, N. J., from September 29, 1888, to December 31, 1890; the sum of fifty-six dollars ($56.00) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Hoboken, N. J., from October 11, 1888, to January 5, 1889; the sum of one hundred and twenty-six dollars ($126.00) for excessive and unlawful transportation charges on shipment of petroleum oil in barrels by said claimant from Reno, Pa., to New York City, N. Y., from January 15, 1889, to March 29, 1893; the sum of sixteen dollars and eighty cents ($16.80) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Jersey City, N. J., from July 17, 1889, to July 24, 1889; the sum of sixteen dollars and eighty cents ($16.80) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels

by said claimant from Reno, Pa., to Bergen Point, N. J., from
187 January 28, 1892, to January 18, 1893, the sum of seven hundred and fifty dollars and twenty-six cents ($750.26) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Centerville, N. J., from February 11, 1890, to May 11, 1891; the sum of eight dollars and forty cents ($8.40) for excessive and unlawful transportation charges on a shipment of petroleum oil in barrels by said claimant from Reno, Pa., to Newark, N. J., on or about September 6, 1892; the sum of one hundred and eight dollars and eighty cents ($108.80) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Middleboro, Mass., from September 22, 1888, to November 21, 1890; the sum of two hundred and twenty-eight dollars and eighty cents ($228.80) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Fitzwilliam, N. H., from October 6, 1888, to October 30, 1890; the sum of nineteen dollars and twenty cents ($19.20) for excessive and unlawful transportation charges on a shipment of petroleum oil in barrels by said claimant from Reno, Pa., to Portland, Me., on or about November 23, 1889; the sum of forty-one dollars and seventy-six cents ($41.76) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Boston, Mass., from October 30, 1890, to February 23, 1891; the sum of nineteen dollars and twenty cents ($19.20) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to East Boston, Mass., from November 3, 1890, to November 13, 1890; the sum of twenty-eight dollars and eighty cents ($28.80) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimant from Reno, Pa., to Winchendon, Mass., from
October 6, 1890, to November 15, 1890; the sum of nineteen
188 dollars and twenty cents ($19.20) for excessive and unlawful transportation charges on shipments of petroleum oil in barrels by said claimants from Reno, Pa., to Keene, N. H., from December 2, 1890, to January 10, 1891; the sum of twelve dollars and eighty cents ($12.80) for excessive and unlawful transportation charges on a shipment of petroleum oil in barrels by said claimant from Reno, Pa., to Springfield, Mass., on or about October 15, 1892; and the said New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, are hereby ordered and required to pay to the claimant, S. Y. Ramage, doing business under the trade name of the Mutual Oil Company, the aforesaid sums, amounting in all to the first mentioned sum of fourteen thousand two hundred and sixty-one dollars and forty-two cents ($14,261.42), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

The foregoing shall stand as the report and orders of the Commission upon the claims for reparation in these cases which have been served by claimants upon defendant initial carriers under the stipu-

lation of counsel on May 16, 1894. The rights of other persons, firms or corporations entitled to claim reparation under said order of November 14, 1892, are unaffected by these supplementary proceedings and orders, and such claimants may, on failure of the defendants to adjust their demands, proceed, upon their basis of reparation prescribed in said order, to enforce their claims in the courts as provided by the law. A number of claims have been suggested which apply to shipments participated in by initial carriers not mentioned in said order of November 14, 1892. These claims are not directly involved in these cases, and the claimants are entitled to proceed against the carriers concerned in such manner and under such provisions of law as they may be advised.

By the Commission:

Washington, D. C., October 22, 1895.

——— ———, *Secretary.*

189 Before the Interstate Commerce Commission.

No. 163.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PENNSYLVANIA, and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA,

vs.

THE PENNSYLVANIA RAILROAD CO. and THE WESTERN NEW YORK & PENNSYLVANIA RAILROAD CO.

Decision of Supplementary Hearing and in the Matter of Reparation.

1. Upon supplementary hearing a finding of fact in the report filed herein on November 14, 1892, and applying to the defendant, the Pennsylvania Railroad Company, is changed so as to appear as a summary of certain evidence.

2. It appearing that defendants are and have been able to furnish a large number of tank cars for the shipment of petroleum oil, and that defendants' liability to make reparation to claimants in this case under the order of the Commission of November 14, 1892, depends upon whether the use of tank cars for shipments of oil over the defendant roads, or by the "Green Line," has been open to the claimants; or, if so, whether the delivering carrier made this privilege useless to claimants through discriminating exactions imposed at the terminal point; and, it also appearing that the claims in this case require separate investigation, and that the present record does not enable the Commission to determine whether any of such claims are supported by facts as would bring them within the terms of the order of November 14, 1892.

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Held, that claimants' further remedy is by proceeding in the courts under Section 16 of the Act to Regulate Commerce.

M. J. Heywang, for complainants.

James A. Logan, for Pennsylvania Railroad Company.

Frank Rumsey, for Western New York and Pennsylvania Railroad Company.

Report and Opinion of the Commission.

By the Commission:

It is claimed for the defendants in this case that they have been, before and since the decision of the Commission herein on November 14, 1892, and are now, complying with the requirements of our order of that date by which the defendants were, among other things, directed as follows:

To "cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; and that, on or before the 9th day of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges, pursuant to the provisions of Section 6 of the Act to Regulate Commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section."

191 "And said defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels, when the use of tank cars has not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use; and inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary."

On petition filed by the Pennsylvania Railroad Company on February 15, 1893, that defendant was allowed, under a memorandum and order of the Commission of October 19, 1893, to take and file depositions with sole reference to a finding contained on page 11 of our report and opinion of November 14, 1892, which it alleged to be erroneous, and which reads as follows:

"From this state of facts it appears that while about 450 tank cars of the Pennsylvania Railroad Company may be 'open to shippers indiscriminately,' it is only upon the conditions of shipment to Communipaw for delivery there to the National Storage Company and that the facilities owned by this storage company for bulk shipment are not available to shippers in general."

This leave was granted, however, upon certain conditions as to time of notice and filing, and upon the further condition that the petitioning defendant should, prior to the taking of such testimony, publish in its oil tariffs the notification to the public required by our order of November 14, 1892. Said notice was duly published

by that company, and the depositions of James A. Hand, Wm. S. Motheral and Wm. H. Joyce, taken on its behalf, were filed.

192 This case and two other cases of the Independent Refiners' Associations (Nos. 153 and 154) were afterwards set for hearing on claims for reparation which had been filed with the Commission under our order of November 14, 1892, and at such hearing the complainants were allowed to rebut the testimony contained in the depositions above mentioned.

The following appears in the concluding portion of our memorandum herein of October 19, 1893, allowing the Pennsylvania Railroad Company to submit certain further evidence:

"Under existing circumstances, if the Pennsylvania Railroad Company furnishes tank cars to applying shippers to its New York Harbor oil terminal without discrimination, and the facilities at that terminal for the deliverey of oil to consignees and bulk steamers are also provided and controlled without discrimination or prejudice as against any shipper or consignee,—and this company declares its ability, and, upon leave being granted, its intention to show this,—we think it is discharging its duty in this respect under the requirements of our order."

While the additional testimony taken on behalf of the Pennsylvania Railroad Company asserts positively that no discrimination whatsoever is practiced between shippers by it, or the Storage Company in charge at Communipaw, in the matter of receiving oil at that point and delivery of oil therefrom to consignees or bulk steamers, still, considered in connection with rebuttal testimony taken at the hearing in Titusville, we are not satisfied that the claiming refiners are in all respects upon entirely equal footing with their extremely powerful competitor, the Standard Oil Company or Trust, in shipping export oil through Communipaw. No evidence has been presented to refute complainants' repeated charge that the National Storage Company is controlled by or affiliated with the Standard Oil Company or Trust, and the testimony is to the effect that the Pennsylvania Railroad Company is required by contract or agreement to de-

193 liver oil destined to New York harbor points only at Communipaw and into the possession of the Storage Company, which acts as the carrier's agent at that point. It may be true, as testified, that in the mere carriage and delivery of export oil at Communipaw the carrier is without fault. It may or may not be true that the business of storage, sorting, loading into bulk steamers and other matters shown in this case to have been subsequent to the service of hauling, are matters outside of the business of common carriage by railroad. But the fundamental wrong, if any exists, is found in the railroad company's practice of making a controlling agency at its sole terminal for a large and important traffic of a company whose interests may be identical or largely so with those of a single large shipper, or a combination of large shippers, and consequently antagonize the interests of many smaller and competing shippers. Such an agency may exert a controlling influence upon the treatment of oil during the process of mixing and steamer-loading, and concerning the imposition of sundry extra charges, even though such

services are directly performed by others. There is testimony to the effect that charges made for the reception and delivery of oil shipped for export through Communipaw were considerably higher than at Perth Amboy and other points having exporting facilities. The testimony of the witnesses produced by the railroad company presents a contradiction which is also worthy of note. Mr. Hand distinctly testified that the business of the National Storage Company was confined to storage simply, while Mr. Motheral stated in his testimony that considerable quantities of oil had been bought in the oil regions by a Mr. Owen for the account of the Storage Company, and that it was consigned to an officer of the Storage Company.

We are not prepared to say, upon the evidence, that the finding on page 11 of our original report was incorrect, but we think that the additional testimony calls for such modification as will
194 take from it the character of a positive finding and make it stand as a summary of evidence. For the words, "From this state of facts it appears," which begin the finding, other words will be substituted so as to make such statement on page 11 of that report read as follows: *"It is testified in substance,* that while about 450 tank cars of the Pennsylvania Railroad Company may be 'open to shippers indiscriminately,' it is only upon the conditions of shipment to Communipaw for delivery there to the National Storage Company, and that the facilities owned by this storage company for bulk shipments are not available to shippers in general," and to this should be added the words, *but this is denied by witnesses sworn on behalf of said railroad company.*

In relation to methods employed by the Pennsylvania Railroad Company through its oil bureau which is termed the "Green Line," in furnishing shippers with tank cars from its equipment of 1,100 or more, while in a general sense the evidence tends to support its claim that such cars are supplied to shippers indiscriminately, we regret that the testimony was not more precise as to the course of the company in furnishing these cars to the claiming shippers, respectively.

We decline to hold, upon the evidence, that the Pennsylvania Railroad Company and its affiliated roads, including the defendant, the Western New York and Pennsylvania Railroad Company, and over which is operated what is called the "Green Line," have been acting in full compliance with our order of November 14, 1892, or that they are exempt from liability to make reparation to claiming shippers for damage under said order. On the other hand, we also decline to decide whether lawful demands are contained in the claims for reparation in this case. It would be unjust to the claimants to exempt carriers from liability under said order, and thereby deprive the claimants of their right of action in the courts, unless the evi-
dence clearly demonstrated that these carriers were, in all re-
195 spects, acting in conformity with the requirements of such order during the whole period covered by it, which we have fixed in the other cases of the Refiners' Associations as the time between September 3, 1888, and May 15, 1894. It is also plain, from

what is above set forth, that the present record does not enable us to determine whether the claims or any portion of them are supported by such facts as would bring them within the terms of our order of November 14, 1892. The situation of the reparation claims in this case, then, is practically the same as existed at the date when that order was issued. Under the terms of said order, if any of the claimants, members of the complaining associations, can show that the use of tank cars for his shipments of oil over the defendant's roads or by the "Green Line" during the period above mentioned was denied to him, or that the delivering carrier made this privilege useless to him through discriminating exactions imposed at the terminal point, he will be entitled to recover that portion of the transportation charges which was applied to the carriage of the barrels. Under the circumstances the claims in this case require entirely separate investigation; they cannot, as was possible in the other two cases of the Refiners' Associations, be considered together under a general finding that the carriers had no tank cars among their equipment. In this case it is shown that the "Green Line" carriers had at least 1100 of these cars at their disposal, and it is asserted that not less than 450 of them were devoted to the shipments in question. It results, therefore, that the most we can do in this case is to define the basis of reparation which may be claimed. This has already been done. Our order of November 14, 1892, fixed it at the transportation charge made on the barrel package, and directed that such reparation be made to the parties legally entitled thereto. The claimants have the right, under the procedure provided in section 16 of the
196 statute, to bring suit for enforcement of our order directing reparation in this case, and in any such proceeding they will have full opportunity to state and prove their individual claims. The entry of further order by the Commission in this case appears unnecessary.

By the Commission:

Washington, D. C., October 22, 1895.

—— ——, *Secretary.*

Before the Interstate Commerce Commission.

No. 119.

RICE, ROBINSON & WITHEROP
vs.
WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

In the Matter of Reparation.

1. Complainants having filed a petition for reparation long after decision by the Commission and compliance therewith by the defendant carrier:

Held, 1. That the case will not be reopened in a supplementary proceeding, which is only brought to secure reparation for the purpose of ruling upon questions not decided in the original case. 2. That as to the reparation demanded for injuries which resulted from practice found unlawful in said decision, it would be unwise and unjust to amend a final order entered several years ago and promptly obeyed by the defendant carrier, so as to subject such carrier to further requirements in favor of complainants in respect of violations corrected under said order.

M. J. Heywang, for Complainants.
Frank Rumsey, for Defendant.

197 *Report and Opinion of the Commission.*

By the COMMISSION:

A decision was rendered in this proceeding on December 2, 1888, dismissing the complaint, but the case was reopened by order entered April 15, 1889, on complainant's petition that further evidence be taken in connection with the hearing assigned for other and similar cases at Titusville, Pa., on May 15, following. Said other cases were the foregoing entitled cases brought by the Independent Refiners' Association of Titusville and Oil City, Pa. After these Independent Refiners' cases had been heard, but before they were decided, the Commission filed its report and opinion and entered an order in this case on September 5, 1890, by which the defendant was directed and required, among other things, to cease and desist from charging for the weight of the barrel in shipments of petroleum oil in carloads from Titusville, Pa., to Buffalo, N. Y. The defendant carrier complied with the requirements of said order on October 1, 1890. The Commission did not provide in said order for reparation to the complainants, nor was the question reserved for future action. After our decision and order of November 14, 1892, in the Independent Refiners' cases above mentioned, by which decision and order reparation was awarded to the injured parties in those cases, the successors of the complaining firm in this case filed a petition

asking that the defendant company, notwithstanding its compliance with the decision rendered herein, be further required to make reparation to complainants, not only for damages resulting from the charges on the weight of the barrel, which is the sole subject of reparation claims in the Independent Refiners' case, but on a variety of c[illegible] grounds specified in the petition for reparation.

198 This petition for a reparation order was filed on March 28, 1893, about two and a half years after our order of September 5, 1890, was complied with by the defendant.

The petitioners appear to have requested the defendant to make reparation some weeks after the decision in September, 1890, and the carrier's compliance therewith on October 1 of that year, the defendant's counsel seems, by a letter written to counsel for complainants in March, 1891, to have recommended that the matter be submitted to the Commission for adjudication, but that complainants should wait to do so until the disposition by the Commission of the cases brought by the Independent Refiners' Associations. This, however, was mere suggestion; no stipulation of the parties for delay in presenting or deciding a supplemental petition for reparation in this case pending the disposition of other proceedings was ever brought upon record.

The reparation demanded in the original complaint was for the sum of two thousand, eight hundred and eighty-six dollars and forty-six cents ($2,886.46) with interest to date of complaint, and was based on the complainants' alleged unlawful charge of 34 cents per barrel of oil carried for complainants from Titusville to Buffalo and the sum of 12 cents a barrel, which complainants alleged was no more than reasonable and which the company received for the haul to Buffalo out of the established through rate on oil from Titusville to Perth Amboy *via* Buffalo. The number of barrels of oil shipped prior to the date of the complaint was stated to be 12,293. Multiplying that number by the difference between the 34 cent rate and the 12 cent proportion of rate, above mentioned, and adding to the product so obtained a "dunnage" expense of $1.00 per car for 182 cars, required to put such cars in condition for loading barreled oil in tiers, gives a result of two thousand, eight hundred and eighty-

199 six dollars and forty-six cents ($2,886.46) the sum demanded in the complaint. An additional complaint, filed March 10, 1888, sets forth an increase of the rate to Buffalo to 36 cents, and reparation was again prayed for.

The decision of the Commission of September 5, 1890, rested upon grounds not specified in the complaint, but upon discriminations brought out in the testimony and coming within the general allegation of injustice. As above stated, the petition for reparation now under consideration and filed 2½ years after the decision and compliance by the carrier, asks for an award for damages resulting from the various discriminations set forth in and corrected by the report and order, including charges made on the weight of barrels containing oil, and also in regard to one or two matters stated in the opinion, but upon which no decision was rendered.

Upon defendant's compliance on October 1, 1890, with our de-

cision of a month previous, this case had, so far as appeared in the record, been heard, decided and closed. We are not willing to consider this case opened in this supplementary proceeding, which only concerns reparation, and rule upon questions in the original cases which were not disposed of by our decision of September 5, 1890. As to reparation now demanded for damages claimed to have resulted from unlawful practices found by said decision, we think it would be unwise, as a matter of practice, and also unjust to the defendant, to amend the final order entered herein nearly four years ago, and promptly obeyed by that company, so as to subject the carrier to further requirements in favor of these complainants in respect of violations which were corrected under said order.

The supplemental petition for reparation in this case is dismissed.

By the Commission:

Washington, D. C., October 22, 1895.

—— ——, *Secretary.*

200 OFFICE OF THE
INTERSTATE COMMERCE COMMISSION,
WASHINGTON, D. C.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, hereby certify that the foregoing exhibits, six in number, and marked A, B, C, D, E and H, are correct copies of the originals thereof on file among the records of the Interstate Commerce Commission.

In testimony whereof, I hereunto set my hand and affix the seal of the said Interstate Commerce Commission, at the City of Washington, in the District of Columbia, this — day of ——.

——— ———,
Secretary of the Interstate Commerce Commission.

Order Fixing Date and Place of Trial.

Per Curiam:

And now, June 28th, 1901, the petition in this case having been filed and the averments thereon having been considered, it is now ordered that the trial of said cause be fixed for the sixth day of August, 1901, in the trial room of this court, at Pittsburg.

It is further ordered that the Marshal forthwith serve a copy of this order and of the petition upon each of the defendants.

M. W. ACHESON,
Circuit Judge.

201 *Order Fixing Date and Place of Trial.*

And now, April 18th, 1902, the petition in this case having been filed and the averments therein contained having been considered, it is ordered that the trial of said cause be fixed for the 19th day of May, 1902, in the trial room of this court, at Pittsburg, Penn'a.

It is further ordered that the marshal forthwith serve a copy of this order and the petition upon the following named defendants,

who have not as yet appeared and answered, said service to be made within the district if same can be obtained therein—if not, wherever service can be obtained, to wit:

New York, Lake Erie & Western Railroad Company; J. G. McCullough and E. B. Thomas, receivers of the New York, Lake Erie & Western Railroad Co. and Erie Railroad Company.

M. W. ACHESON,
Circuit Judge.

Certified from the record this April 18th, 1902.
H. D. GAMBLE, *Clerk.*

April 21, 1902, at Corry, Pa., served the within order and petition accompanying the same upon the Erie Railroad Company by giving true and attested copies thereof to D. S. Rowe, agent of said company at Corry, Pa., and informing him of the contents thereof.

April 21, 1902, at Susquehanna, Pa., served the within order and petition accompanying same upon the New York, Lake Erie and Western Railroad Company by giving a true and attested copy of each to Moses S. Terwilliger, serving agent of said company, at Susquehanna, Pa., and informing him of the contents thereof.

April 24th, 1902, at New York City, N. Y., served the
202 within order and petition accompanying the same upon E. B. Thomas and J. G. McCullough, receivers of the New York Lake Erie and Western Railroad Company by giving a true and attested copy of each to each of said receivers and informing each of them of the contents thereof.

So answers,

STEPHEN P. STONE,
U. S. Marshal.

Demurrer of the Lehigh Valley Railroad Company, One of the Defendants, to the Petition of the Penn Refining Company, Ltd., the Complainant Herein.

The defendant by protestation, not confessing all or any of the matters and things in the said petition contained to be true in such manner and form as the same are therein alleged and set forth, demurs to the said petition upon the following grounds:

First. Because the order of the Interstate Commerce Commission, sought to be enforced in this proceeding, requiring this defendant to pay the amount set forth therein to the plaintiff, is in contravention of and wholly inconsistent with the finding of the Commission itself, that the obligation to refund such amount could only be enforced against the carrier originating the shipments in question, and it affirmatively appears from the petition itself that none of the said shipments did originate on the line of this defendant or on lines controlled by it.

Second. Because it appears from said petition that the order of the Interstate Commerce Commission sought to be enforced requires this defendant to refund to the plaintiff alleged overcharges on the shipments in question which did not accrue to and were not re-

ceived by it, but which did accrue to and were received by other carriers whose lines in connection with that of this defendant
203 formed the through line over which said shipments moved.

Third. Because the order of the Interstate Commerce Commission which is sought to be enforced in this proceeding makes all the defendants parties to a through line severally liable to the full amount of damages or claims for reparation, and that said order is therefore unlawful and void.

Fourth. Because it appears from said petition that the order of the Interstate Commerce Commission sought to be enforced, requires this defendant to refund to the plaintiff alleged overcharges on shipments made over its line as part of a through line as aforesaid during the period between February 11th, 1892, and August 1st, 1893, and that during said period the railroads, property and franchises of this defendant were operated, controlled and held by another corporation, viz., the Philadelphia and Reading Railroad Company, under and by virtue of a lease, dated February 11th, 1892.

Fifth. Because it is not averred in said petition that notice was ever given to the Lehigh Valley Railroad Company by the complainants in the proceeding before the Interstate Commerce Commission or any of them to furnish tank cars for the purpose of loading and shipping oil therein, and the alleged action of the Lehigh Valley Railroad Company in continuing to charge for the weight of the barrel was therefore not in violation of the order made by said Interstate Commerce Commission.

Wherefore and for divers other good causes of demurrer appearing in said petition, this defendant demurs thereto and humbly demands the judgment of this Court whether it shall be compelled to make any further or other answer to the said petition, and it prays to be hence dismissed with its costs and charges in this behalf sustained.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Lehigh Valley R. R. Co.

204 STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

John R. Fanshawe, having been duly sworn, deposes and says that he is the Secretary of the Lehigh Valley Railroad Company, the defendant above named, and that the foregoing demurrer is not interposed for delay.

JNO. R. FANSHAWE.

Sworn to and subscribed before me this 28th day of October, A. D. 1901.

OSCAR PRICE,
Notary Public.

[SEAL.]

(Commission expires May 16, 1905.)

Additional Cause of Demurrer of the Lehigh Valley Railroad Company.

This defendant, by leave of the Court first had and obtained, assigns the following additional causes of demurrer:

Sixth. Because the order of the Commission is predicated upon the theory that the defendants were under obligation to furnish tank cars upon demand or otherwise, desist from charging for the weight of the barrel package, whereas no such obligation exists, and the said order is, therefore, an unlawful one.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For the Lehigh Valley Railroad Company.

205 *Demurrer of Delaware and Hudson Canal Co.*

The demurrer of the defendant The Delaware and Hudson Company, impleaded as The Delaware and Hudson Canal Company, to the petition of the above-named petitioner Penn Refining Company, Limited, of Oil City, Pennsylvania.

This defendant by protestation, not confessing all or any of the matters or things in the said petition contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said petition, and for causes of demurrer shows that:

1. It appears by the petitioner's own showing by the said petition that it is not entitled to the relief prayed by the petition against this defendant, and the said petition does not contain any matter of equity whereon this Court can ground any decree or give to the petitioner any relief against the defendant, and the said petition wholly fails to state any cause of action at law against this defendant.

2. The said petition is exhibited against this defendant and against numerous other defendants to the said petition, for several distinct and independent matters and causes which have no relation to each other, and in several whereof or in the greater part of which this defendant is in no way interested or concerned, and the said petition is altogether multifarious and causes of action are improperly joined, in that causes of action in which this defendant has no interest are joined with causes of action to which it is alleged to be a party.

Wherefore, and for divers other good causes of demurrer appearing upon the said petition, this defendant demurs thereto, and it prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said pe-
206 tition, and it humbly prays to be hence dismissed, with its reasonable costs in this behalf sustained.

THE DELAWARE AND HUDSON COMPANY,
By F. M. OLYPHANT, *Secretary.*
DAVID WILCOX,
Solicitor and Attorney of Said Defendant,
20 Nassau Street, N. Y. City.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in law.

DAVID WILCOX,
Counsel for Defendant the Delaware and Hudson Company.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

F. Murray Olyphant, being duly sworn, says that he is the Secretary of the above-named defendant the Delaware and Hudson Company, and that the foregoing demurrer is not interposed for delay.

F. M. OLYPHANT.

Sworn to before me this 11th day of October, 1901.
[SEAL.]
FRANK WALLING,
Notary Public, N. Y. Co.

207 *Amended Demurrer of Delaware and Hudson Canal Company.*

The amended demurrer of the defendant, The Delaware and Hudson Company, impleaded as The Delaware and Hudson Canal Company, to the petition of the above-named petitioner, Penn Refining Company, Limited, of Oil City, Pennsylvania.

This defendant, by protestation, not confessing all or any of the matters or things in the said petition contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said petition, and for cause of demurrer shows that:

1. It appears by the petitioner's own showing by the said petition that it is not entitled to the relief prayed by the petition against this defendant, and the said petition does not contain any matter of equity whereon this court can ground any decree or give to the petitioner against the defendant, and the said petition discloses no cause of action upon which the petitioner would have right at law to recover any sum whatever against the defendant.

2. No facts are pleaded in the plaintiff's petition supporting the orders of the Interstate Commerce Commission therein set forth, and it appears by the petition that the same were not lawful orders.

3. The plaintiff's petition discloses the fact that any claim which it might have or allege against the defendant accrued more than six years before action brought, and his remedy or suit thereon is barred by the statute of limitations.

4. The said petition is exhibited against this defendant and against numerous other defendants to the said petition, for several distinct and independent matters and causes which have no relation to each other, and in several whereof or in the greater part of which
208 this defendant is in no way interested or concerned, and the said petition is altogether multifarious, and causes of action at law are improperly joined, in that causes of action in which this

defendant has no interest are joined with causes of action to which it is alleged to be a party.

Wherefore, and for divers other good causes of demurrer appearing upon the said petition, this defendant demurs thereto, and it prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said petition, and it humbly prays to be hence dismissed, with its reasonable costs in this behalf sustained.

THE DELAWARE AND HUDSON COMPANY,
By F. M. OLYPHANT, *Secretary.*

DAVID WILLCOX,
Solicitor and Attorney of said Defendant,
20 Nassau Street, N. Y. City.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in law.

DAVID WILLCOX,
Counsel for Defendant, The Delaware and Hudson Company.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

F. Murray Olyphant, being duly sworn, says that he is the Secretary of the above named defendant, The Delaware and Hudson Company, and that the foregoing demurrer is not interposed for delay.

F. M. OLYPHANT.

Sworn to before me this 29th day of November, 1901.
[SEAL.]
NELLIE M. FAILEY,
Notary Public, N. Y. Co.

209 *Order Overruling Demur of Lehigh Valley Railroad Company.*

Per Curiam:

And now, December 31, 1901, it is ordered that the demurrers of the Lehigh Valley Railroad Company filed at Nos. 23, 27, 28, 31, 35, 36, 41, 43, 44, 49, 52 and 53 of May Term, 1901, be and they are overruled, with leave to the said defendant to answer in the several cases within 30 days from this date; without prejudice to the right of the company to raise by answer and at the trial the question of its liability during the period in which the railroad was operated by its lessee.

BY THE COURT.

Order Overruling Demur of Delaware & Hudson Canal Company.

Per Curiam:

And now, December 31, 1901, it is ordered that the demurrers of the Delaware and Hudson Company filed at Nos. 25 and 51 of May Term, 1901, be and they are overruled, with leave to the said de-

fendant to answer in the said cases respectively within 30 days from this date.

BY THE COURT.

210 *Answer of Western New York & Pennsylvania Railway Company.*

To the Honorable, the Judges of said Court:

The answer of the above named defendant, the Western New York & Pennsylvania Railroad Company, to the Petition of the above named complainant, respectfully represents:

That it admits its incorporation as a railroad company, generally as set forth in the plaintiff's petition, and that it is a common carrier engaged in transportation in the territory stated in said petition.

This respondent, however, further answering, saith that it was not a party to the proceedings which were had, prosecuted and terminated, in the manner set forth in the said petition, and further, this defendant specifically denies the allegations of the ninth paragraph of the said petition, to-wit: that the liability of the Western New York & Pennsylvania Railway Company and Samuel G. De Coursey, Receiver of said railroad company, if any such liability existed, to make reparation to the plaintiffs was assumed by and binding upon, or is in any way a claim against this respondent.

On the other hand, this respondent avers that it is a corporation entirely distinct and separate from said railroad company, and has not assumed, nor is it in any way liable for the obligations of said railroad company.

Further answering the averments of said petition, this defendant, admitting that proceedings were had and prosecuted and terminated, in the manner therein set forth, denies that the determination of the said Interstate Commerce Commission is just or legal, or within the powers conferred upon it by the statutes of the United States. On the contrary, the said Interstate Commerce Commission has
211 sought to regulate and determine matters which are not committed to it by the several acts of Congress regulating proceedings before said commission relating to the carriage and transportation of freight and passengers by common carriers.

Further, this defendant denies that it is guilty of any discrimination between shippers of freight or merchandise, or is liable in any manner to pay to any of the said complainants any sum whatever for discrimination or unjust charges for freight on carriage of goods and merchandise. That the fact is, and the evidence taken before the said Interstate Commerce Commission shows that all regulations made as to the shipments of commodities complained of in said petition were fair, just and equitable and dealing equally and without discrimination amongst all the shippers, and this respondent denies that it has violated any lawful order or requirement of the Commission created by the Act of Congress in such case made and provided.

In all of which matters this defendant submits itself to trial by jury before your Honorable Court in the due course of law.

PATTERSON & STERRETT,
Attorneys for W. N. Y. & P. Ry. Co.

212 *Answer of Western New York & Pennsylvania Railroad Co. and Samuel G. De Coursey, the Receiver Thereof.*

To the Honorable, the Judges of the said Court:

The answer of the above named defendants, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof, to the petition of the above named complainant, respectfully represents:

That the defendant, the Western New York & Pennsylvania Railroad Co., admits its incorporation, the place of the principal office, the receiver thereof, the transfer of its property to and ownership, operation and control thereof by the Western New York & Pennsylvania Railway Co., as stated in paragraph one of said petition.

That Samuel G. De Coursey, joined herein as defendant, is the Receiver of the said Western New York & Pennsylvania Railroad Company, duly appointed.

That the said defendant, the Western New York & Pennsylvania Railroad Company, was a common carrier, as alleged in said petition and engaged in transportation in the territory therein stated.

That proceedings were had, prosecuted and terminated before the said Interstate Commerce Commission, in the manner set forth in the said petition filed in the above case.

Further answering the averments of the said petition, this defendant, the Western New York & Pennsylvania Railroad Co., admitting that proceedings were had and prosecuted and terminated, in the manner therein set forth, denies that the determination of the Interstate Commerce Commission is just or legal, or within the powers conferred upon it by the statutes of the United States. On the contrary, the said Interstate Commerce Commission has sought to regulate and determine matters which are not committed to it by
213 the several Acts of Congress regulating proceedings before said Commission relating to the carriage and transportation of freight and passengers by common carriers.

Further, this defendant denies that it is guilty of any discrimination between shippers of freight or merchandise, or is liable in any manner to pay to any of the said complainants any sum whatever for discrimination or unjust charges for freight on carriage of goods and merchandise. That the fact is, and the evidence taken before the said Interstate Commerce Commission shows, that all regulations made as to the shipment of commodities complained of in said petition were fair, just and equitable and dealing equally and without discrimination amongst all the shippers, and this respondent denies that it has violated any lawful order or requirement of the Commission created by the Act of Congress in such case made and provided.

In all of which matters this defendant submits itself to trial by jury before your Honorable Court in the due course of law.

FRANK RUMSEY, Esq.,
Attorney for Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof.

214 *Answer of the Lehigh Valley Railroad Co.*

The Lehigh Valley Railroad Company, one of the defendants above named, answering the petition of the plaintiff, says:

1. It admits that it is a corporation organized and existing under the laws of Pennsylvania, and having its principal office at Philadelphia, in said State, and that it is and was on the third day of September, 1888, a common carrier engaged in the transportation of passengers and property between points in different States, viz: the States of Pennsylvania, New York and New Jersey.

It does not, however, nor did it on September 3d, 1888, nor at any time, reach, by its own lines or any lines operated or controlled by it, Titusville or Oil City, Pennsylvania, or any points in the vicinity of these cities, or any part of the oil regions of the State of Pennsylvania. It does, and did on the date named, reach by its lines Perth Amboy, New Jersey, known as a New York harbor point, and it has, in the past, participated to the extent of the haul over its own lines and only to this extent in the carriage of oil from Titusville, Oil City and other points in the oil regions of Pennsylvania to Perth Amboy. All oil so hauled by it originated on the line either of the New York, Lake Erie & Western Railroad or of the Western New York & Pennsylvania Railroad. The oil originating on the former road was delivered to your company at Waverly, and the oil originating on the line of the Western New York & Pennsylvania Railroad was delivered to it at Buffalo, both in the State of New York.

It does not now, and never has, hauled any oil which originated on its own lines, nor has any oil at any time been produced or shipped from the territory tributary to its lines.

215 Between the eleventh day of February, 1892, and the thirty-first day of July, 1893, it did not haul nor participate in the haul of any oil whatsoever, nor did it carry any other commodity or freights, as between the dates named, all its lines were operated by and in the control of the Philadelphia and Reading Railroad Company, as lessee thereof, under a lease bearing date February 11th, 1892, to which the defendant begs leave to refer with the same effect as if the same were fully set forth herein.

It has no information sufficient to enable it to answer as to the averments set forth in paragraph I of the petition, other than those which concern its own organization and acts.

II. It admits that the various proceedings and orders were had and made which are set forth in paragraphs II, III and IV of said petition, but it denies that the orders referred to therein made by the

Interstate Commerce Commission were lawful orders or requirements which it was required or bound to obey.

III. It admits the service upon it as averred in paragraph V of the petition, and of a copy of the report and order therein referred to.

IV. It admits that the proceedings were had and the orders made which are set forth in paragraphs VII and VIII of the petition, but it denies that any obligation in respect to the amounts hereby directed to be paid to the petitioners, or any one of them, was imposed upon this respondent, because the said orders were not within the power of the Interstate Commerce Commission to make, and were in other respects improper and invalid, and hence were not lawful orders of the Commission which this respondent was called upon or required to obey.

V. It has no information which will enable it to answer as to the averments contained in paragraph IX of the petition.

216 VI. It admits the averments contained in paragraph X of the petition.

VII. For answer to the averments of paragraph XI of the petition, this respondent says: That its lines did, in conjunction with the lines of the other company or companies referred to therein, form a through line or route over which oil was shipped from the oil regions of Pennsylvania to Perth Amboy, but it denies that any common control, management, or arrangement existed between it and the said other company or companies in relation to the oil business, other than that which resulted from the establishment of a through rate from the point of origin to destination, made up of the rates which each company respectively was willing to establish and charge for the service performed by it on its own lines, and an understanding as to the through movement, without breaking bulk of the car in which the oil was shipped.

The through rate thus established was, for the convenience of all parties concerned, paid and received as a gross sum; but, save as above, it was in no sense a joint service or charge over the entire through line over which the shipments moved.

It denies that the effect of such an arrangement with its connecting lines was to constitute a partnership with them or to make this respondent liable for any of their acts or defaults, and especially it denies that it is or can be made liable for any alleged overcharge by them for the service performed by them, or for any alleged failure on their part to furnish adequate or proper facilities for the shipment of the oil, or for any alleged discrimination in the furnishing of equipment to the shippers of such oil.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
Attorneys for Lehigh Valley Railroad Company.

217 *Answer of Western New York & Pennsylvania Railway Company.*

To the Honorable the Judges of said Court:

The answer of the above named defendant, the Western New York & Pennsylvania Railway Company, to the petition of the above named complainant, respectfully represents:

That it admits its incorporation as a railroad company, generally as set forth in the plaintiff's petition, and that it is a common carrier engaged in transportation in the territory stated in said petition.

This respondent, however, further answering, saith that it was not a party to the proceedings which were had, prosecuted and terminated, in the manner set forth in the said petition, and, further, this defendant specifically denies the allegations of the ninth paragraph of the said petition, to wit: that the liability of the Western New York & Pennsylvania Railway Company and Samuel G. De Coursey, receiver of said railroad company, if any such liability existed, to make reparation to the plaintiffs was assumed by the binding upon, or in any way a claim against this respondent.

On the other hand, this respondent avers that it is a corporation entirely distinct and separate from said railroad company, and has not assumed, nor is it in any way liable for the obligations of the said railroad company.

Further answering the averments of said petition, this defendant, admitting that proceedings were had and prosecuted and terminated, in the manner therein set forth, denies that the determination of the said Interstate Commerce Commission is just or legal, or within the powers conferred upon it by the statutes of the United States. On the contrary, the said Interstate Commerce Commission has sought to regulate and determine matters which are not committed to it by the several acts of Congress regulating proceedings before
218 said commission relating to the carriage and transportation of freight and passengers by common carriers.

Further, this defendant denies that it is guilty of any discrimination between shippers of freight or merchandise, or is liable in any manner to pay to any of the said complainants any sum whatever for discrimination or unjust charges for freight on carriage of goods and merchandise. That the fact is, and the evidence taken before the said Interstate Commerce Commission shows that all regulations made as to the shipments of commodities complained of in said petition were fair, just and equitable and dealing equally and without discrimination amongst all the shippers, and this respondent denies that it has violated any lawful order or requirement of the commission created by the act of Congress in such case made and provided.

In all of which matters this defendant submits itself to trial by jury before your Honorable Court in the due course of law.

PATTERSON & STERRETT,
Attorneys for W. N. Y. & P. R'y Co.

219 *Answer of Western New York & Pennsylvania Railroad Co. and Samuel G. De Coursey, the Receiver Thereof.*

To the Honorable the Judges of the said Court:

The answer of the above named defendants, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof, to the petition of the above named complainant, respectfully represents:

That the defendant, the Western New York & Pennsylvania Railroad Co., admits its incorporation, the place of its principal office, the receiver thereof, the transfer of its property to and ownership, operation and control thereof by the Western New York & Pennsylvania Railway Co., as stated in paragraph one of said petition.

That Samuel G. De Coursey, joined herein as defendant is the Receiver of the said Western New York & Pennsylvania Railroad Company, duly appointed.

That the said defendant, the Western New York & Pennsylvania Railroad Company, was a common carrier, as alleged in said petition and engaged in transportation in the territory therein stated.

That proceedings were had, prosecuted and terminated before the said Interstate Commerce Commission, in the manner set forth in the said petition filed in above case.

Further answering the averment of the said petition, this defendant, the Western New York & Pennsylvania Railroad Co., admitting that proceedings were had and prosecuted and terminated, in the manner therein set forth, denies that the determination of the Interstate Commerce Commission is just or legal, or within the power conferred upon it by the statutes of the United States. On the contrary, the said Interstate Commerce Commission has sought to regulate and determine matters which are not committed to it by
220 the several Acts of Congress regulating proceedings before said commission relating to the carriage and transportation of freight and transportation by common carriers.

Further, this defendant denies that it is guilty of any discrimination between shippers of freight or merchandise, or is liable in any manner to pay to any of the said complainants any sum whatever for discrimination or unjust charges for freight on carriage of goods and merchandise. That the fact is, and the evidence taken before the said Interstate Commerce Commission shows, that all regulations made as to the shipment of commodities complained of in said petition were fair, just and equitable and dealing equally and without discrimination amongst all the shippers, and this respondent denies that it has violated any lawful order or requirement of the Commission created by the Act of Congress in such case made and provided.

In all of which matters this defendant submits itself to trial by jury before your Honorable Court in the due course of law.

FRANK RUMSEY, Esq.,
Attorney for Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver Thereof.

221 *Answer of the Defendant, The New York, Lake Erie & Western Railroad Company.*

The defendant, The New York, Lake Erie & Western Railroad Company, not waiving, but insisting that the petition herein does not state facts sufficient to constitute a cause of action against it, for answer to the said petition, or to so much thereof as it is advised that it is material or necessary for it to make answer unto, answering, says:

I. This defendant admits that it is a corporation organized under the laws of New York and formerly had its principal office in New York City, New York, and that at the times mentioned in said petition it was a common carrier engaged in the transportation of passengers and property, alone or in connection with other lines of railroad, between points in different States of the United States, but avers that at the time of the filing of said petition it had ceased to own or operate any railroad line whatever, its property having many years previously been sold under foreclosure of a mortgage previously made by it. This defendant has no knowledge or information sufficient to enable it to form a belief as to any other of the allegations contained in the First paragraph of the petition.

II. This defendant admits that certain proceedings were had before the Interstate Commerce Commission, as stated in the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth paragraphs of the said petition; and that the petitions annexed to said petition, marked "Exhibits A and B," were filed as therein stated, and that this defendant duly filed answers to the said petitions; and this defendant prays leave to refer to its said answers on the hearing of this cause, with the same force and effect as if the said answers were fully set forth herein. This defendant further admits that the matters in issue upon said petitions were brought to a hearing before the Interstate Commerce Commission, and that the said Com-

222 missioner made its decision report and order thereon (copies of which are annexed to the petition herein as "Exhibits D and E") and that copies of said report and order *was* served upon this defendant; but this defendant denies that it appeared upon the said hearing that this defendant had violated any provisions of the Act to Regulate Commerce in the respects alleged to in the said petition, or otherwise. This defendant further admits that further proceedings were subsequently had before the said Interstate Commerce Commission in respect to the claims for reparation referred to in the petition, and that afterwards, on October 22, 1895, the said Commission did make and file a further or supplementary report opinion and order in said causes (a copy whereof, marked "Exhibit H," is annexed to the petition) and that the said Commission subsequently caused a copy of said report, opinion and order to be delivered to this defendant. This defendant denies that it has violated or wilfully failed or neglected to obey or to conform to the requirements of any lawful order of the Interstate Commerce Commission. This defendant has no knowledge or information

sufficient to enable it to form a belief as to the truth of the other allegations contained in said paragraphs of the petition.

III. This defendant den[illegible]e allegations contained in the ninth paragraph of the said petit[illegible]

IV. This defendant admits the allegations contained in the tenth paragraph of the said petition.

V. This defendant admits that the lines of railroad operated by it prior to July 25, 1893, did, in conjunction with other lines, form a through line or route over which oil was transported from the oil regions of Pennsylvania to points in other State or States, but it denies that any common control, management or arrangement existed between it and any other company or companies in relation to the oil business other than that which resulted from the establishment of a through rate from the point of origin to destination, made up of the r[illegible]es which each company, respect-
223 ively, was willing to establish and charge for the services performed by it on its own lines, and an understanding as to the through movement without breaking bulk of the car in which the oil was shipped. The through rate thus established was, for the convenience of all parties, paid and received as a gross sum; but, save as above, it was in no sense a joint service or charge over the entire through line over which the shipments were transported. It denies that the effect of such an arrangement with these connecting lines was to constitute a partnership with them, or to make this defendant liable for any of their acts or defaults, and especially it denies that it is or can be made liable for any alleged overcharge by them for the services performed by them, or for any alleged violation on their part to furnish adequate or proper facilities for the shipment of the oil or for any alleged discrimination in the furnishing of equipment to the shippers of such oil.

VI. This defendant denies each and every allegation contained in said petition not hereinbefore specifically admitted or answered thereunto.

VII. This defendant, further answering, denies that the orders of the Interstate Commerce Commission referred to in the petition were lawful orders or that this defendant was bound to obey the same, or that this defendant has violated any lawful order of the said commission or any provisions of the act to regulate commerce in the respects alleged in the said petition, or that the rates charged by this defendant which were passed upon by the said commission were unjust or unreasonable, or in violation of said act, or that they operated to effect any unjust discrimination, prejudice or disadvantage as against certain shippers therein mentioned, or otherwise howsoever; and this defendant, further answering, says that the decision of the Interstate Commerce Commission to that effect was not justified by the evidence produced before the said commission, or by any findings of fact by said commission,
224 and that the said decision imposed upon the defendants affected thereby requirements which were beyond its power and authority to impose.

VIII. This defendant further avers that the pretended cause of

action alleged in the petition arose more than six years prior to the service of said petition upon this defendant, and is barred by the Statute of Limitations of the State of Pennsylvania in such case made and provided; and that in consequence of such statute and of the laches and delay of the petitioner in commencing this proceeding, the petitioner is not entitled to have or maintain this action or any action against this defendant by reason of the facts stated in said petition.

Wherefore, the defendants demand that the petition be dismissed with costs.

STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant New York, Lake Erie & Western R. R. Co.

FREDERIC B. JENNINGS,
Of Counsel.

225 *Answer of Defendants J. G. McCullough and E. B. Thomas, as Receivers.*

The defendants J. G. McCullough and Eben B. Thomas, as Receivers, not waiving, but insisting, that the petition herein does not state facts sufficient to constitute a cause of action against them, for answer to the said petition, or to so much thereof as they are advised that it is material or necessary for them to make answer unto, answering, say:

I. These defendants admit that the New York, Lake Erie & Western Railroad Company is a corporation organized under the laws of New York, and formerly had its principal office in New York City, New York, and that these defendants were formerly receivers thereof; but these defendants deny that they still are receivers thereof, and, on the contrary, aver that they have been discharged as such receivers by the United States Circuit Courts which appointed them, and that an order so discharging them was duly made and entered in the United States Circuit Court for the Western District of Pennsylvania in the suit in which they were appointed, on the 19th day of February, 1897. These defendants admit and aver that since December 1, 1895, some of the railroad properties theretofore owned, controlled or operated by the New York, Lake Erie & Western Railroad Company have been owned, controlled or operated by the Erie Railroad Company, a corporation which was duly organized and created under the laws of New York, by filing its certificate of corporation on or about November 14, 1895, and that said last-mentioned railroad company since the said first day of December, 1895, has been, and is a common carrier engaged in the transportation of passengers and property, alone or in connection with other lines of railroads, as stated in the first paragraph of the said petition. These defendants further admit that on the 3rd day of September

226 1888, and for some years thereafter the said defendant, the New York, Lake Erie & Western Railroad Company was a common carrier engaged in the transportation of persons and prop

erty, wholly by railroad, alone or together with other lines of railroad, as stated in the first paragraph of the petition. These defendants have no knowledge or information sufficient to enable them to form a belief in respect to any of the other allegations contained in the first paragraph of said petition.

II. These defendants admit, upon their information and belief, that certain proceedings were taken by the Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, before the Interstate Commerce Commission, as alleged in paragraph second of the petition; but aver that these defendants were not parties to the said proceedings, had not at that time been appointed receivers, and have no knowledge or information sufficient to enable them to form a belief in respect to the nature, character or extent of said proceedings or in respect to the truth of the allegations contained in the said second paragraph of the said petition of the exhibits therein mentioned, save the allegation that such proceedings were instituted.

III. These defendants admit, upon their information and belief, that the Interstate Commerce Commission on or about November 14, 1892, made a report in said proceedings, a copy of which is attached to the petition as "Exhibit D;" but aver that these defendants have no knowledge or information sufficient to enable them to form a belief in respect to any other of the allegations contained in paragraph Third of said Petition, or in respect to any of the facts stated in said report; and these defendants particularly deny that the Interstate Commerce Commission ever forwarded to these defendants, or either of them, any statement of any charges referred to in the Exhibits annexed to said petition, or any notice to satisfy the
227 complaint or to answer the same, or that these defendants ever filed any answer thereto, or that these defendants were in any way parties to or affected by the said proceedings or that in said proceedings or otherwise it was made to appear to the satisfaction of said Commission that these defendants, or either of them, had violated any provision of the Act to Regulate Commerce.

IV. These defendants have no knowledge or information sufficient to enable them to form a belief in respect to the truth of the allegations contained in the Fourth paragraph of said petition, except that these defendants deny that any such order or notice as therein mentioned was ever made or served upon these defendants or in any proceedings in which these defendants were parties.

V. These defendants have no knowledge or information sufficient to enable them to form a belief in respect to the truth of the allegations contained in the Fifth paragraph of the said petition, except that they deny that a copy of the report, "Exhibit D," or of the order or notice, "Exhibit E," therein referred to, was ever delivered to or served upon these defendants or either of them.

VI. These defendants have no knowledge or information sufficient to enable them to form a belief in respect to the truth of the allegations contained in paragraph Sixth of the said petition, except that they deny that these defendants, or either of them, ever wilfully failed or neglected to obey or conform to any lawful order of the

Interstate Commerce Commission served upon them or made in any proceeding to which they were parties.

VII. These defendants admit, upon their information and belief, that certain proceedings were had as alleged in paragraph Seventh of the petition, but they aver that they were not parties to the said proceedings and have no knowledge or information sufficient to enable them to form a belief in respect to the nature, character
228 or extent thereof, and they particularly deny that they appeared before the Commission at Titusville in said proceeding, as stated in said paragraph.

VIII. These defendants admit that the Interstate Commerce Commission on or about October 22, 1895, made and filed a report, a copy whereof, marked "Exhibit H," is annexed to the petition; but they have no knowledge or information sufficient to enable them to form a belief in respect to any other of the allegations contained in paragraph Eighth of the said petition or in respect to any of the facts stated in said report, and they deny that these defendants were in any way parties to or affected by the said proceeding, or that the petitioner is entitled to recover from or should be paid by these defendants any part of the sum specified in said report or any other sum whatsoever; and these defendants further deny that any obligation in respect to the amounts directed by the said report to be paid to the petitioners, or any one of them, was imposed upon these defendants or either of them.

IX. These defendants deny the allegations contained in the ninth paragraph of the said petition.

X. These defendants admit the allegations contained in paragraph tenth of the petition.

XI. These defendants admit that the lines of railroad which were operated by the New York, Lake Erie & Western Railroad Company down to July 25, 1893, and by these defendants as receivers of the said road from July 25, 1893, to May 15, 1894, did in connection with lines of other companies form a through line or route over which oil was shipped from the oil regions of Pennsylvania to certain points in other State or States mentioned in "Exhibit H;" but they deny that these defendants had any connection whatever with the said lines prior to July 25, 1893, or any responsibility whatever for the management thereof by the New York, Lake Erie & Western Railroad Company, and they also deny that any common
229 control, management or arrangement existed between the New York, Lake Erie & Western Railroad Company during its period of operation, or these defendants during their period of operation, and any such other company or companies in relation to the oil business, other than that which resulted from the establishment of a through rate from point of origin to destination, made up of the rates which each carrier respectively was willing to establish and charge for the services performed by it on its own lines, and an understanding as to the through movement without breaking bulk of the car in which the oil was shipped. The through rate thus established was, for the convenience of all parties concerned, paid and received as a gross sum, but save as above it was in no sense

joint service or charge over the entire through line over which the shipments moved. They deny that the effect of such an arrangement with the connecting lines was to constitute a partnership with them or to make these defendants liable for any of their acts or defaults, or any acts or defaults other than their own, and especially they deny that they are or can be made liable for any alleged overcharge by the New York, Lake Erie & Western Railroad Company or by any of such connecting lines for the services performed by them or for any alleged violation on their part to furnish adequate or proper facilities for the shipment of the oil or for any alleged discrimination on their part in the furnishing of equipment to the shippers of such oil.

XII. These defendants deny each and every allegation contained in said petition not hereinbefore specifically admitted or answered unto.

XIII. And these defendants, further answering, aver that the said orders of the Interstate Commerce Commission were made in proceedings to which these defendants were not parties, and that the said orders and said proceedings did not affect these defendants and were in no way binding upon them.

230 XIV. And these defendants, further answering, aver that the claims referred to in the petition herein arose from alleged overcharges made by the New York, Lake Erie & Western Railroad Company prior to the appointment of these defendants as receivers thereof; that the said claims, if valid or enforcible at all, constitute merely unpreferred claims against the said company, which were never assumed by these defendants as receivers thereof, and for which they are not in any wise responsible.

XV. These defendants, further answering, aver that the property of the New York, Lake Erie & Western Railroad Company, of which these defendants were appointed as receivers, was sold November 6, 1895, under a decree of the United States Circuit Court for the Southern District of New York, entered August 21, 1895, foreclosing a mortgage previously made by the said Railroad Company, known as its Second Consolidated Mortgage, and under ancillary decrees entered in the United States Circuit Courts, in this and other districts, on or about August 28, 1895; that the property so sold was subsequently conveyed to the Erie Railroad Company, which took possession thereof on December 1, 1895, when these defendants, in pursuance of the orders of said Courts, surrendered the possession of said property. And these defendants, further aver that, in and by the said decree of foreclosure, it was expressly provided that any claims for indebtednes, obligations or liabilities against the Receivers or the New York, Lake Erie & Western Railroad Company entitled to priority over the mortgage should be presented for allowance and filed within six months after the first publication by the Receivers of a notice to the holders of such claims to present the same for allowance, and that any claims which should not be so presented or filed within such period of six months should not be enforcible against the Receivers, nor against the property sold, nor against the pur-

chaser or purchasers, his or their successors or assigns. That
231 in pursuance of said provisions of said decree these defendants as such Receivers caused such a notice to be published, as required thereby, once a week for a period of six weeks, and that the claims set up in the petition herein were not prsented to or filed with these defendants as such Receivers within the period fixed by the said decree and such notice; that after the expiration of such period these defendants closed their accounts, and were duly discharged as such Receivers by orders of the United States Circuit Courts, subsequently made in the Southern District of New York, on the 4th day of February, 1897, and in this and other districts in which ancillary orders had been made appointing them, on or about the 19th day of February, 1897; and the defendants pray leave to refer to the said decree, order and proceedings on file as a part hereof.

XVI. These defendants, further answering, aver that the pretended cause of action alleged in the petition arose more than six years prior to the service of said petition upon these defendants, and is barred by the Statute of Limitations of the State of Pennsylvania in such case made and provided; and that in consequence of such statute and of the *laches* and delay of the petitioner in commencing this proceeding, the petitioner is not entitled to have or maintain this action or any action against these defendants by reason of the facts stated in the said petition.

XVII. These defendants, further answering, deny that the said orders of the Interstate Commerce Commission referred to in said petition were lawful orders or that these defendants were in any way bound to obey them, or any of them, and further deny that the rates sought to be affected by such orders were unjust or unreasonable, or in anywise in violation of the Act to Regulate Commerce, or that the requirements of said orders or either of them can lawfully be imposed upon these defendants; and aver that the said
232 orders and the requirements thereof were in all respects invalid and unlawful and without binding force or effect.

Wherefore, the defendants demand that the petition be dismissed with costs.

STETSON, JENNINGS & RUSSELL,
Attorneys for Defendants McCullough and Thomas.

FREDERICK B. JENNINGS,
Of Counsel.

Answer of the Defendant, Erie Railroad Co.

The defendant Erie Railroad Company, not waiving, but insisting that the petition herein does not state facts sufficient to constitute a cause of action against it, for answer to the said petition, or to so much thereof as it is advised that it is material or necessary for it to make answer unto, answering, says:

I. This defendant admits, upon its information and belief, that the New York, Lake Erie & Western Railroad Company is a corporation organized under the laws of New York, and formerly had its

rincipal office in New York City, New York, and that J. G. McCullough and E. B. Thomas formerly were receivers thereof; but denies hat they still are such receivers, and, on the contrary, avers upon its nformation and belief, that they have been discharged as such receivers by the various Courts appointing them. This defendant urther admits that since December 1, 1895, some of the railroad roperties therefore owned, controlled or operated by the New York, ake Erie & Western Railroad Company have been owned, controlled or operated by this defendant; and that this defendant is a orporation which was duly organized and created, under the laws f New York, by the filing of its certificate of incorporation on or bout November 14, 1895, having its principal office at New York City, New York; and that this defendant, since said last
233 mentioned date, has been and now is a common carrier, engaged in the transportation of passengers and property, alone r in connection with other lines of railroad, as stated in the First aragraph of the said petition. This defendant has no knowledge r information sufficient to enable it to form a belief as to any of the ther allegations contained in paragraph First of the said petition.

II. This defendant admits, upon its information and belief, that ertain proceedings were taken by the Independent Refiners' Association of Titusville, Pennsylvania, and others, before the Interstate Commerce Commission, as alleged in paragraph Second of the said etition; but avers that this defendant was not a party to the said roceedings, was not in existence at the time that the said roceedings were instituted and carried on and has no knowledge r information sufficient to enable it to form a belief in respect to he nature, character or extent of said proceedings, or in respect to he truth of the allegations contained in the Second paragraph of the aid petition or the exhibits therein mentioned, save the allegation hat such proceedings were instituted.

III. This defendant admits, upon information and belief, that the nterstate Commerce Commission, on or about November 14, 1892, nade a report, a copy of which is attached to the petition as "Exibit D;" but avers that this defendant was not a party to the proeedings in which such report was made, and has no knowledge in espect thereto, and this defendant has no knowledge or information ufficient to enable it to form a belief in respect to any other of the llegations contained in paragraph Third of the said petition, or in espect to any of the facts stated in said report; and this defendant articularly denies that the said Commission ever forwarded to this efendant any statement of any charges referred to in the exhibits nnexed to said petition, or any notice to satisfy the complaint or to answer the same, or that this defendant ever filed any
234 answer thereto, or that this defendant was in any way a party to or affected by the said proceedings, or that in said proceedng or otherwise it was made to appear to the satisfaction of said Comission, or at all, that this defendant had violated any provisions of he Act to Regulate Commerce.

IV. This defendant admits, upon information and belief, that the nterstate Commerce Commission on or about November 14, 1892,

made an order or notice in said proceedings, as stated in the Fourth paragraph of the petition, a copy of which is attached to the petition as "Exhibit E;" but this defendant denies that any such order or notice as therein mentioned was ever made or served upon this defendant, or in any proceedings to which this defendant was a party; and this defendant has no knowledge or information sufficient to enable it to form a belief in respect to any other of the allegations contained in paragraph Fourth of the petition.

V. This defendant has no knowledge or information sufficient to enable it to form a belief, in respect to the truth of the allegations contained in the Fifth paragraph of the said petition, except that this defendant denies that a copy of the report, "Exhibit D," or of the order or notice, "Exhibit E," therein referred to, was ever delivered to or served upon this defendant.

VI. This defendant denies that it ever willfully, or at all, failed or neglected to obey or conform to the requirements of the order and notice referred to in paragraph Sixth of the petition, and it particularly denies that the said order and notice ever commanded or required this defendant to refund to the petitioner, or any other parties, any sums whatsoever. This defendant has no knowledge or information sufficient to enable it to form a belief in respect to any other of the allegations contained in said paragraph Sixth of the petition.

235 VII. This defendant admits, upon its information and belief, that certain proceedings were had as set forth in paragraph Seventh of the petition, but it avers that it was not a party to the said proceedings, and has no knowledge or information sufficient to enable it to form a belief in respect to the nature, character or extent thereof; and it particularly denies that it has at any time wilfully failed or neglected to obey or conform to the requirements of any lawful order of the Interstate Commerce Commission, or has ever violated any such order, or any provisions of the Act to Regulate Commerce, in respect to the matters referred to in said petition.

VIII. This defendant admits that the Interstate Commerce Commission on or about October 22, 1895, made and filed a report, a copy whereof marked "Exhibit H" is annexed to the petition; but it has no knowledge or information sufficient to enable it to form a belief in respect to any other of the allegations contained in paragraph Eighth of the said petition, or in any respect to any of the facts stated in said report, and it denies that this defendant was in any way a party to or affected by the said proceeding, or that the petitioner is entitled to recover from, or should be paid by, this defendant any part of the sums specified in said report or any other sum whatsoever; and this defendant further denies that any obligation in respect to the amounts directed by the said report to be paid to the petitioner was imposed upon this defendant.

IX. This defendant denies the allegations contained in the Ninth paragraph of the said petition.

X. This defendant admits the allegations contained in paragraph Tenth of the petition.

XI. This defendant has no knowledge or information sufficient

to enable it to form a belief as to the truth of the allegations contained in the eleventh paragraph of said petition.

236 XII. This defendant denies each and every allegation contained in the said petition not hereinbefore specifically admitted or answered unto.

XIII. This defendant, further answering, avers that the said orders of the Interstate Commerce Commission referred to in the petition were made in proceedings to which this defendant was not a party and before this defendant came into existence, and that the said orders and said proceedings were not addressed to this defendant and did not affect it and were in no way binding upon it, and that it is in no way responsible for any of the claims referred to in said orders or by reason of any of the matters set up in said petition.

XIV. And this defendant, further answering, avers that the claims referred to in the petition herein arose from alleged overcharges made by the New York, Lake Erie & Western Railroad Company, or the receivers thereof, prior to the purchase of its property by this defendant, which this defendant never assumed and for which it never became responsible; that the property of the New York, Lake Erie & Western Company was sold November 6, 1895, under a decree of the United States Circuit Court for the Southern District of New York, entered August 21, 1895, foreclosing a mortgage previously made by the said railroad company, known as its Second Consolidated Mortgage, and under ancillary decrees entered in the United States Circuit Courts, in this and other districts, on or about August 28, 1895; that the property so sold was subsequently conveyed to this defendant, which took possession thereof on December 1, 1895. And these defendants further aver that in and by the said decree of foreclosure it was expressly provided that any claims for indebtedness, obligations or liabilities against the receivers of the New York, Lake Erie & Western Railroad Company entitled to priority over the mortgage should be presented for allowance and filed within six months after the first publications

237 by the receivers of a notice to the holders of such claims to present the same for allowance, and that any claims which should not be so presented or filed within such period of six months should not be enforcible against the receivers, nor against the property sold, nor against the purchaser or purchasers, his or their successors or assigns. That in pursuance of said provisions of said decree the said receivers caused such a notice to be published, as required thereby, once a week for a period of six weeks, and that the claims set up in the petition herein were not presented to or filed with such receivers within the period fixed by the said decree and such notice, and cannot be enforced against this defendant.

XV. This defendant further avers that the pretended cause of action alleged in the petition arose more than six years prior to the service of said petition upon this defendant, and is barred by the Statute of Limitations of the State of Pennsylvania in such case made and provided; and that in consequence of such statute and of the *laches* and delay of the petitioner in commencing this proceeding, the petitioner is not entitled to have or maintain this action or any

action against this defendant by reason of the facts stated in the said petition.

Wherefore, this defendant demands that the petition be dismissed with costs.

STETSON, JENNINGS & RUSSELL,
Attorneys for Defendant Erie R. R. Co.

FREDERICK B. JENNINGS,
Of Counsel.

238 *Answer of Delaware and Hudson Co.*

To the Honorable the Judges of the Circuit Court of the United States within and for the Western District of Pennsylvania:

The answer of the defendant, The Delaware and Hudson Company (sued as The Delaware and Hudson Canal Company), to the petition of the petitioner, The Penn Refining Company.

I. The defendant admits it is a corporation organized under the laws of New York, having its principal office at New York City, and avers that its correct corporate name is The Delaware and Hudson Company. The defendant denies any knowledge or information sufficient to form a belief of the remaining allegations of paragraph I of the petition.

II. The defendant admits that the proceedings alleged in paragraph II of the petition took place as therein stated. It denies any knowledge or information sufficient to form a belief of the allegations contained in "Exhibits A, B and C" attached to the petition and referred to in said paragraph II.

III. The defendant admits that a hearing was had before the Interstate Commerce *Committee* and that it filed a report, a copy of which is attached to the petition marked "Exhibit D." It denies any knowledge or information sufficient to form a belief of the remaining allegations of paragraph III and of the statements of fact contained in said "Exhibit D."

IV. The defendant admits that on or about November 14, 1892, the Interstate Commerce Commission made an order or notice as alleged in paragraph IV of the petition, and that a copy of said notice is attached to the said petition and marked "Exhibit E." No facts are, however, set forth in the petition or the exhibits
239 thereto warranting said order and the same was, therefore, not a lawful order.

V. The defendant admits that it received a copy of said papers "Exhibits D and E" as alleged in paragraph V of the petition. The defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of said paragraph V.

VI. The defendant admits that it has not refunded any sum to the petitioner herein, as alleged in paragraph VI of the petition. The defendant denies any knowledge or information sufficient to

form a belief of each and every other allegation of said paragraph VI.

VII. The defendant admits that the proceedings alleged in paragraph VII of the petition were had before the Commission. The defendant denies any knowledge or information sufficient to form a belief of the remaining allegations of said paragraph VII.

VIII. The defendant admits that the Commission filed a certain paper, as alleged in paragraph VIII of the petition, a copy of which is attached to the petition and marked "Exhibit H," and that a copy of the same was delivered to the defendant. The defendant denies any knowledge or information sufficient to form a belief of the remaining allegations of paragraph VIII of the petition, and of the statements of fact contained in said "Exhibit H." No facts are set forth in the petition or the exhibits attached thereto warranting said order, and the same was, therefore, not a lawful order.

IX. The defendant denies any knowledge or information sufficient to form a belief of the allegations of paragraph IX of the petition.

X. The defendant admits that it has not paid to the petitioner the sum specified in paragraph X of the petition, or any other sum. The defendant denies any knowledge or information sufficient to form a belief of the remaining allegations of said paragraph X.

240 XI. The defendant admits that at the time alleged in paragraph XI of the petition it constituted a through line together with the other carriers therein named. The defendant denies any knowledge or information sufficient to form a belief of the remaining allegations of said paragraph XI of the petition.

XII. Any claim which the petitioner might have or allege against the defendant accrued more than six years before action brought, and his remedy or suit thereon is barred by the Statute of Limitations.

THE DELAWARE AND HUDSON COMPANY,

[SEAL.] By F. M. OLYPHANT, *Secretary.*

DAVID WILCOX,
Solicitor and Attorney for Said Defendant,
20 Nassau Street, New York, N. Y.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

F. Murray Olyphant, being duly sworn says, that he is the secretary of The Delaware and Hudson Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the grounds of deponent's belief as to all matters in said answer not stated upon his knowledge are the familiarity he has with the affairs of the said company as such secretary thereof; that the reason why

this varification is not made by said defendant is that the defendant is a corporation and, therefore, unable to make the same.

F. M. OLYPHANT.

Sworn to before me this 5th day of March, 1902.

NELLIE M. FAILEY,
Notary Public, N. Y. Co.

241 *Answer of Western New York & Pennsylvania Railway Company.*

To the Honorable the Judges of said Court:

The answer of the above named defendant, the Western New York & Pennsylvania Railway Company, to the said petition of the above named complainant, respectfully represents:

That it admits its incorporation as a railroad company, generally as set forth in the plaintiff's petition, and that it is a common carrier engaged in transportation in the territory stated in said petition.

This respondent, however, further answering, saith that it was not a party to the proceedings which were had, prosecuted and terminated, in the manner set forth in the said petition, and, further, this defendant specifically denies the allegations of the ninth paragraph of the said petition, to-wit, that the liability of the Western New York & Pennsylvania Railway Company and Samuel G. De Coursey, Receiver of said railroad company, if any such liability existed, to make reparation to the plaintiffs was assumed by and binding upon, or in any way a claim against this respondent.

On the other hand, this respondent avers that it is a corporation entirely distinct and separate from said railroad company, and has not assumed, nor is it in any way liable for the obligations of said railroad company.

Further answering the averments of said petition, this defendant, admitting that proceedings were had and prosecuted [illegible] terminated, in the manner therein set forth, denies that the determination of the Interstate Commerce Commission is just or legal, or within the powers conferred upon it by the statutes of the United States. On the contrary, the said Interstate Commerce Commission has sought

242 to regulate and determine matters which are not committed to it by the several acts of Congress regulating proceedings before said commission relating to the carriage and transportation of freight and passengers by common carriers.

Further, this defendant denies that it is guilty of any discrimination between shippers of freight or merchandise, or is liable in any manner to pay to any of the said complainants any sum whatever for discrimination or unjust charges for freight on carriage of goods and merchandise. That the fact is, and the evidence taken before the said Interstate Commerce Commission shows that all regulations made as to the shipment of commodities complained of in said petition were fair, just and equitable and dealing equally and without discrimination amongst all the shippers, and this re-

spondent denies that it has violated any lawful order or requirement of the Commission created by the act of Congress in such case made and provided.

In all of which matters this defendant submits itself to trial by jury before your Honorable Court in the due course of law.

PATTERSON & STERRETT,
Attorneys for W. N. Y. & P. Ry. Co.

243 *Answer of the Fitchburg Railroad Company.*

To the Honorable the Judges of the said Court:

The answer of the above named defendant, the Fitchburg Railroad Company, to the petition of the above named complainants, respectfully represents:

That the defendant, the Fitchburg Railroad Company, admits its incorporation, the place of its principal office, as stated in paragraph one of said petition.

That the said defendant, the Fitchburg Railroad Company, was a common carrier, as alleged in said petition, and engaged in transportation in the territory therein stated.

That proceedings were had, prosecuted, and terminated before the said Interstate Commerce Commission, in the manner set forth in the said petition filed in above case.

Further answering the averments of the said petition, the defendant, the Fitchburg Railroad Company, admitting that proceedings were had and prosecuted and terminated, in the manner therein set forth, denies that the determination of the Interstate Commerce Commission is just or legal, or within the powers conferred upon it by the statutes of the United States. On the contrary, the said Interstate Commerce Commission has sought to regulate and determine matters which are not committed to it by the several Acts of Congress regulating proceedings before said Commission relating to the carriage and transportation of freight and passengers by common carriers.

Further, this defendant denies that it is guilty of any discrimination between shippers of freight or merchandise, or is liable in any manner to pay to any of the said complainants any sum whatever for discrimination or unjust charges for freight on carriage of goods and merchandize. That the fact is, and the evidence taken before the said Interstate Commerce Commission shows, that all regulations made as to the shipment of commodities complained of in
244 said petition were fair, just and equitable and dealing equally and without discrimination amongst all the shippers, and this respondent denies that it has violated any lawful order or requirement of the Commission created by the Act of Congress in such case made and provided.

In all of which matters this defendant submits itself to trial by jury before your Honorable Court in the due course of law.

GEO. A. TORREY,
Attorney for Fitchburg Railroad Company.

Answer of the Boston & Maine Railroad.

To the Honorable the Judges of said Court:

The answer of the above named defendant, the Boston and Maine Railroad, to the petition of the above named complainant, respectfully represents:

That the defendant, the Boston and Maine Railroad, admits its incorporation, the place of its principal office, as stated in Paragraph one of said petition.

That the said defendant, the Boston and Maine Railroad, was a common carrier, as alleged in said petition, and engaged in transportation in the territory therein stated.

That proceedings were had, prosecuted, and terminated before the said Interstate Commerce Commission, in the manner set forth in said petition filed in the above case.

Further answering the averments of said petition, this defendant, the Boston and Maine Railroad, admitting that proceedings were had and prosecuted and terminated, in the manner therein set forth, denies that the determination of the Interstate Commerce Commission is just or legal, or within the powers conferred upon it by the statutes of the United States. On the contrary, the said Interstate Commerce Commission has sought to regulate and determine matters which were not committed to it by the several Acts of Con-
245 gress regulating proceedings before said commission, relating to the carriage and transportation of freight and passengers by common carriers.

Further, this defendant denies that it is guilty of any discrimination between shippers of freight or merchandise, or is liable in any manner to pay to any of the said complainants any sum whatever for discrimination or unjust charges for freight on carriage of goods and merchandise. That the fact is, and the evidence taken before the said Interstate Commerce Commission shows, that all regulations made as to the shipment of commodities complained of in said petition were fair, just, and equitable, and dealing equally and without discrimination amongst all the shippers, and this respondent denies that it has violated any lawful order or requirement of the Commission created by the act of Congress in such cases made and provided.

In all of which matters this defendant submits itself to trial by jury before your Honorable Court in the due course of law.

WILLIAM H. COOLIDGE,
Attorney for Boston and Maine Railroad.

246 *Answer of Western New York & Pennsylvania Railroad Co., and Samuel G. De Coursey, the Receiver Thereof.*

To the Honorable, the Judges of the said Court:

The answer of the above named defendants, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof, to the petition of the above named complaint, respectfully represents:

That the defendant, the Western New York & Pennsylvania Railroad Co., admits its incorporation, the place of its principal office, the receivership thereof, the transfer of its property to and ownership, operation and control thereof by the Western New York & Pennsylvania Railway Co., as stated in paragraph one of said petition.

That Samuel G. De Coursey, joined herein as defendant, is the Receiver of the said Western New York & Pennsylvania Railroad Company, duly appointed.

That the said defendant, the Western New York & Pennsylvania Railroad Company, was a common carrier, as alleged in said petition and engaged in transportation in the territory therein stated.

That proceedings were had, prosecuted and terminated before the said Interstate Commerce Commission, in the manner set forth in the said petition filed in the above case.

Further answering the averments of the said petition, this defendant, the Western New York and Pennsylvania Railroad Co., admitting that proceeding were had and prosecuted and terminated in the manner herein set forth, denies that the determination of the Interstate Commerce Commission is just or legal, or within the powers conferred upon it by the statutes of the United States. On the contrary, the said Interstate Commerce Commission has sought to regulate and determine matters which are not committed it by
247 the several Acts of Congress regulating proceedings before said commission relating to the carriage and transportation of freight and passengers by common carriers.

Further this defendant denies that it is guilty of any discrimination between shippers of freight or merchandise, or is liable in any manner to pay to any of the said complainants any sum whatever for discrimination or unjust charges for freight on carriage of goods and merchandise. That the fact is, and the evidence taken before the said Interstate Commerce Commission shows that all regulations made as to the shipment of commodities complained of in said petition were fair, just and equitable and dealing equally and without discrimination amongst all the shippers, and this respondent denies that it has violated any lawful order or requirement of the Commission created by the Act of Congress in such case made and provided.

In all of which matters this defendant submits itself to trial by jury before your Honorable Court in the due course of law.

FRANK RUMSEY, Esq.,
Attorney for Western New York and Pennsylvania Railroad Company and Sam'l G. De Coursey, Receiver Thereof.

248 *Points Submitted on Behalf of Lehigh Valley R. R. Co.*

The learned Judge is requested to charge the jury as follows:

I. To entitle the plaintiff to recover, it must have proven to the satisfaction of the jury that it sustained a loss equal to the amount awarded to it by the Interstate Commerce Commission, because of

having been unable to secure tank cars and of being consequently obliged to ship in barrels the oil covered by the award, and as there is no evidence which would justify the jury in so finding, the verdict should be for the defendant, the Lehigh Valley Railroad Company.

II. As it is conceded that no oil originated on its line, the Lehigh Valley Railroad Company as a common carrier, was under no obligation to furnish to the plaintiff or to other shippers of oil, cars for the carriage of the same, but it was obliged to receive from the Western New York & Pennsylvania Railroad Company and transport to Perth Amboy any cars, whether box or tank, loaded with oil, which were delivered to it by the Western New York & Pennsylvania Railroad Company, and was entitled to make for such service a reasonable charge; and as the Interstate Commerce Commission has found the rates charged and received by the Lehigh Valley Railroad Company on oil shipped in barrels were reasonable, the plaintiff cannot recover any part of the same, even though the plaintiff may have been obliged to ship in barrels because of the refusal after demand made of the Western New York & Pennsylvania Railroad Company to furnish tank cars for the same, and the verdict should therefore be for the defendant, the Lehigh Valley Railroad Company.

III. The Lehigh Valley Railroad Company, by joining with the Western New York & Pennsylvania Railroad Company in the establishment of a through rate from the point of origin of the oil
249 to Perth Amboy, did not make itself liable to any one injured because of the unlawfulness of such through rate, except to the extent to which its participation in the same contributed to such injury, and as the award of the Interstate Commerce Commission against the Lehigh Valley Railroad Company, upon which this action is founded, went beyond this and charged the Lehigh Valley Railroad Company with the alleged overcharge made by both companies to the through line, the award was not a lawful one, and your verdict should therefore be for the defendant, the Lehigh Valley Railroad Company.

IV. The award made by the Interstate Commerce Commission was an unlawful one in that it directed the Lehigh Valley Railroad Company to pay to the plaintiff alleged overcharges for the carriage of its oil made by the Philadelphia and Reading Railroad Company, which, under a lease dated February 11th, 1892, operated the railroad of the Lehigh Valley Railroad Company between February 11th, 1892, and August 1st, 1893, and your verdict, therefore, should be for the defendant, the Lehigh Valley Railroad Company.

V. If the jury believe, and the evidence to this effect is uncontradicted, that the only shipments made in tank cars over the Lehigh Valley Railroad were those made by members of the Association, of which the plaintiff was one, then such tank car shipments did not constitute a discrimination against the plaintiff which would support or justify the award made by the Interstate Commerce Commission, and hence your verdict should be for the defendant, the Lehigh Valley Railroad Company.

VI. It affirmatively appears that, in the ascertainment of the amount awarded to the plaintiff, the Interstate Commerce Commis-

sion charged the defendants with the amount collected by them, on account of the weight of the barrel, on the shipments of oil covered by the award without any proof having been adduced or find-
250 ing of fact made that such shipments were thus made in barrels because of the inability of the plaintiff to procure tank cars. The assessment thus made was erroneous, and the order for the payment of the amount awarded is therefore not a lawful order of the Commission, and the plaintiff therefore cannot recover in this proceeding.

VII. As the plaintiff has not shown the amount of damage, if any, that he sustained, by reason of the alleged overcharge made by the defendants on shipments of oil made in barrels to Perth Amboy during the period covered by the award made by the Interstate Commerce Commission, the verdict should be for the defendant, the L. V. R. R. Co.

VII-. Under the evidence, the plaintiff is not entitled to recover from the defendant, the Lehigh Valley Railroad Company, and your verdict should therefore be for the defendant, the said Lehigh Valley Railroad Company.

F. I. GOWEN,
For L. V. R. R. Co.

251 *Defendant's Point.*

Counsel for The Western New York & Pennsylvania Railway Company respectfully asks the Court to charge the jury in above entitled case:

That under all the evidence the verdict of the jury should be for the defendant, The Western New York & Pennsylvania Railway Company.

Counsel for The Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof, respectfully asks the Court to charge the jury in above entitled case:

That under all the evidence the verdict of the jury should be for the defendant, The Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof.

Counsel for the Western New York & Pennsylvania Railroad Company, defendant above named, respectfully asks the Court to charge the jury in above entitled case.

That under all the evidence the verdict should be for the defendant, the Western New York & Pennsylvania Railroad Company.

Counsel for Samuel G. De Coursey, Receiver of the Western New York & Pennsylvania Railroad Company, respectfully asks the Court to charge the jury in above entitled case.

That under all the evidence the verdict of the jury should be for the defendant, Samuel G. De Coursey, Receiver of the Western New York & Pennsylvania Railroad Co.

Counsel for defendant, The New York, Lake Erie & Western Railroad Company, respectfully ask the Court to charge the jury in above entitled case.

That under all the evidence in above entitled case their verdict

should be for the defendant, The New York, Lake Erie & Western Railroad Company.

252 Counsel for the defendant, Erie Railroad Company, respectfully ask the Court to charge the jury in above entitled case as follows:

First. That by the decree of foreclosure in the suit in which these defendants were appointed Receivers of the New York, Lake Erie and Western Railway Co., it was expressly provided that all claims against the Receivers and all claims against the said Railway Company entitled to priority over the mortgage should be presented for allowance and filed within six months after the publication by the Receivers of a notice to holders of such claims to present the same for allowance and that any claims which should not be so presented or filed within such period of six months should not be enforceable against the Receivers, or against the property, or against the purchaser or purchasers, or their successors or assigns. That the receivers caused such a notice to be published, as provided in said decree, and that the claim set up in the petition was not presented to or filed within the period fixed by the said decree and such notice, and, therefore, your verdict should be for this defendant.

Second. That so far as the evidence shows the claims set up in the petition may have arisen from alleged overcharges made by or from acts of the New York, Lake Erie & Western Railroad Co. prior to the appointment of the Receivers thereof and that the said claims, if filed or enforceable at all, constitute merely unpreferred claims against the said company, for which this defendant is not responsible and, therefore, your verdict should be for this defendant.

Third. That the pretended cause of action alleged in the petition did not accrue within the period prescribed by the statute of limitations by the State of Pennsylvania, in such case made and provided, and is accordingly barred by the statute and by the laches and delay of the petitioner, and, therefore, your verdict should be for this defendant.

253 Fourth. That this defendant was not a party to the proceeding before the Interstate Commerce Commission and is not in any way affected thereby. That the findings of said Commission are not legal evidence against it, and there has been a failure to prove any cause of action against it, and, therefore, your verdict should be for this defendant.

Fifth. That this defendant is charged as a joint *tort feasor* and there has been a failure to prove any joint tort, or any tort whatever, on the part of this defendant, and, therefore, your verdict should be for this defendant.

Sixth. That it appears that this defendant had no participation in any of the acts for which recovery is sought in this proceeding and in fact at the time of the commission of the alleged acts had not been incorporated. That if any alleged liability on its part is to be enforced, on the ground of any assumption by it, it can only be done in accordance with the reservation of the foreclosure decree, by an intervention in the foreclosure suit in the Circuit Court of the United States for the Southern District of New York, the court of primary

jurisdiction in the foreclosure suit, and, therefore, your verdict should be for this defendant.

Seventh. That the order of the Interstate Commerce Commission sought to be enforced in this proceeding requires the defendants therein to refund to the several parties legally entitled thereto all sums received by them for transportation over their respective roads or lines of the barrel packages or shipments of oil in barrels when the use of tank cars had not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use. That there has been a failure to prove any sums received by this defendant for such transportation, or that the use of such tank cars was not open to this plaintiff in common with other shippers, or that this plaintiff has been deprived of the use of such tank cars, or that this plaintiff has suffered any damage in consequence thereof, and therefore, your verdict should be for this defendant.

254 Eighth. To entitle the plaintiff to recover against this defendant, it must have proven to the satisfaction of the jury that it sustained a loss equal to the amount awarded to it by the Interstate Commerce Commission, because of having been unable to secure tank cars, and of having been obliged in consequence to ship in barrels the oil covered by the award, and, as there is no evidence which would justify the jury in so finding, the verdict should be for this defendant.

Ninth. The New York, Lake Erie & Western Railway Company, by participating with the Western New York and Pennsylvania Railroad Co. or other lines, in a through rate from the point of origin of the oil to its destination, did not make itself liable to any one injured because of the unlawfulness of such through rate, if the same was unlawful, except to the extent to which its participation in the same contributed to such injury and, as the award of the Interstate Commerce Commission against the New York, Lake Erie & Western Railway Company, upon which this action is founded, charged the said Company with the alleged overcharge made by all the companies to the through rate, and this petition is filed for the purpose of recovering such award, your verdict should be for this defendant.

Tenth. The award made by the Interstate Commerce Commission, which this proceeding is brought to enforce, was an unlawful one and, therefore, your verdict should be for the defendants.

Eleventh. Under the evidence, the plaintiff is not entitled to recover from this defendant, and, therefore, your verdict should be for this defendant.

Counsel for defendant, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver thereof, respectfully ask the Court to charge the jury in above entitled case.

That, under all the evidence, their verdict should be for
255 the defendants, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver thereof.

Counsel for the defendant, the Western New York and Pennsylvania Railway Company, respectfully ask the Court to charge the

jury in above entitled case that, under all the evidence, the verdict of the jury should be for the defendant, the Western New York and Pennsylvania Railway Company.

Counsel for the defendant, the Western New York & Pennsylvania Railroad Co., respectfully ask the Court to charge the jury in above entitled case that, under all the evidence, the verdict of the jury should be for the defendant, the Western New York & Pennsylvania Railroad Co.

Counsel for the defendants, J. G. McCullough and E. B. Thomas, as receivers of the New York, Lake Erie & Western Railway Co., respectfully ask the Court to charge the jury in above entitled case as follows:

First. That these defendants have duly accounted for all funds which came into their hands as such receivers and have been discharged by the order of the Circuit Court of the United States for the Southern District of New York, which originally appointed them, and also by the order of this Court, and, therefore, the verdict should be for these defendants.

Second. That by the decree of foreclosure in the suit in which these defendants were appointed Receivers of the New York, Lake Erie & Western Railway Co., it was expressly provided that all claims against the Receivers and all claims against the said Railway Company entitled to priority over the mortgage should be presented for allowance and filed within six months after the publication by the Receivers of notice to the holders of such claims to present the same for allowance and that any claims which should not be presented or filed within such period of six months should not be enforceable against the Receivers, or against the property, or
256 against the purshaser or purchasers, or their successors or assigns. That these defendants as such Receivers caused such a notice to be published, as provided in said decree, and that the claim set up in the petition was not presented to or filed within the period fixed by the said decree and such notice and, therefore, the verdict of the jury should be for these defendants.

Third. That, so far as appears from the evidence, the claim set up in the petition may have arisen from alleged overcharges made by or from acts of the New York, Lake Erie & Western Railroad Co. prior to the appointment of these defendants as Receivers thereof and that the said claims, if filed or enforceable at all, constitute merely unpreferred claims against the said company, for which these defendants are not responsible and, therefore, your verdict should be for these defendants.

Fourth. That the pretended cause of action alleged in the petition did not accrue within the period prescribed by the statute of limitations of the State of Pennsylvania, in such case made and provided, and is accordingly barred by the statute and by the laches and delay of the petitioner and, therefore, your verdict should be for these defendants.

Fifth. That these defendants were not parties to the proceeding before the Interstate Commerce Commission and are not in any way affected thereby. That the findings of said Commission are not

legal evidence against them and there has been a failure to prove any cause of action against them and, therefore, your verdict should be for these defendants.

Sixth. That these defendants are charged as joint *tort feasers* with the other defendants and there has been a failure to prove any joint *tort*, or any *tort* whatever, on the part of these defendants and, therefore, your verdict should be for these defendants.

Seventh. That there is no proof that these defendants had any participation in any of the acts for which recovery is sought
257 in this proceeding, or that at the time of the commission of the alleged acts these defendants had not been appointed Receivers. That if any alleged liability on their part is to be enforced, on the ground of any assumption by them, it can only be done in accordance with the reservation of the foreclosure decree, by an intervention in the foreclosure suit in the Circuit Court of the United States for the Southern District of New York, the Court of primary jurisdiction in the foreclosure suit, and, therefore, your verdict should be for these defendants.

Eighth. That the order of the Interstate Commerce Commission sought to be enforced in this proceeding requires the defendants therein to refund to the several parties legally entitled thereto all sums received by them for the transportation over their respective roads or lines of the barrel packages or shipments of oil in barrels when the use of tank cars had not been open to shippers impartially and the shipper claiming reparation had been thereby deprived of their use. That there has been a failure to prove any sums received by these defendants for such transportation, or that the use of such tank cars was not open to this plaintiff in common with other shipper, or that this plaintiff has been deprived of the use of such tank cars, or that this plaintiff has suffered any damages in consequence thereof, and, therefore, your verdict should be for these defendants.

Ninth. To entitle the plaintiff to recover against these defendants it must have proven to the satisfaction of the jury that it sustained a loss equal to the amount awarded to it by the Interstate Commerce Commission, because of having been unable to secure tank cars, and of having been obliged in consequence to ship in barrels the oil covered by the award and, as there is no evidence which would justify the jury in so finding, the verdict should be for these defendants.

Tenth. The New York, Lake Erie & Western Railway Co., by participating with the Western New York & Pennsylvania
258 Railroad Co., or other lines, in a through rate from the point of origin of the oil to destination did not make itself liable to any one injured, because of the unlawfulness of such through rate, if the same was unlawful, except to the extent to which its participation in same contributed to such injury, and, as the award of the Interstate Commerce Commission against the New York, Lake Erie & Western Railway Co., upon which this action is founded, charged the said company with the alleged overcharge made by all the companies to the through rate, and this petition is

filed for the purpose of recovering such award, your verdict should be for the defendants.

Eleventh. The award made by the Interstate Commerce Commission, which this proceeding is brought to enforce, was an unlawful one and, therefore, your verdict should be for the defendants.

Twelfth. Under the evidence, the plaintiff is not entitled to recover from these defendants and, therefore, your verdict should be for these defendants.

Counsel for the defendant, Samuel G. De Coursey, Receiver of The Western New York & Pennsylvania Railroad Company, respectfully ask the Court to charge the jury in above entitled case that, under all the evidence, the verdict of the jury should be for the defendant, Samuel G. De Coursey, Receiver of The Western New York & Pennsylvania Railroad Company.

Counsel for the defendant, the Boston and Maine Railroad Company, respectfully ask this Court to charge the jury, that under all the evidence their verdict should be for the defendant named.

And now, May 26th, 1902, counsel for defendant, the West. N. Y. & P. R. R. Co. and Samuel G. De Coursey, receiver thereof, respectfully ask the Court to charge the jury:

That under all the evidence the verdict of the jury should be for the defendants, the West. N. Y. & P. R. R. and Samuel G. De Coursey, receiver thereof.

259 Counsel for defendant, Samuel G. De Coursey, Receiver of the N. Y. & P. R. R. Co., respectfully asks the Court to charge the jury.

That under all the evidence the verdict should be for the defendant named.

And now the Counsel for defendant, the Fitchburg Railroad Company, respectfully ask the Court to charge the jury in our case.

That under all the evidence their verdict should be for the defendant, the Fitchburg Railroad Company.

Counsel for defendant, the W. N. Y. & P. Railway Co., respectfully ask the Court to charge the jury:

That under all the evidence their verdict should be for the defendant, the Western New York & Pennsylvania Railway Co.

Counsel for defendant, the W. N. Y. & P. R. R. Co., ask the Court to charge the jury:

That under all the evidence their verdict should be for the defendant, the W. N. Y. & P. R. R. Co.

260 *Charge of the Court.*

MAY 23, 1902.

BUFFINGTON, *J.*:

GENTLEMEN OF THE JURY: The case which you are called upon to try is one between the Penn Refining Company, Limited, the plaintiff in this case, and the Western New York and Pennsylvania Railroad Company, Samuel G. De Coursey, Receiver of that Company, the Western New York & Pennsylvania Railway Company, and the Lehigh Valley Railroad Company.

You will notice, gentlemen, that the Western New York & Pennsylvania Railroad Company is one corporation and that Samuel G. De Coursey is also sued as the Receiver of that Company, and that there is another company called the Western New York & Pennsylvania Railway company, which is a different corporation.

A brief recital of some general facts will enable you to more clearly understand the issues involved in this case and possibly aid you in the discharge of your duty as jurors.

By the laws of the land, companies or corporations are created for the building and operation of railroads. These companies are termed "common carriers"—and by that we mean that they assume and are bound to carry freight for the public, or whomsoever offers it. That is, a "common carrier" is one who cannot select its customers, but it is bound to carry freight for all persons who may offer such freight to it for carriage. In the performance of this duty the company is bound to treat all persons alike and afford the same accommodations and charge the same freights to all persons for the performance of like services.

By the constitution of the United States, Congress was empowered to "regulate commerce among the several states," and it is this provision which enables it to legislate upon and control interstate commerce, or commerce between the states—a subject of which we hear much nowadays. In pursuance of this power, and for the purpose of controlling and regulating interstate commerce, Congress some years ago enacted a statute, and various supplements thereto, which are known as the Interstate Commerce Acts. By these Acts, we may say in a general way, provision is made against railroads charging unfair freights, against discrimination by them against one person or locality, and there is created a Commission known as the Interstate Commerce Commission, which was given certain powers to investigate violations of the law and to take steps looking towards the prevention or continuance of such violations. After the passage of the original Act, it was found that, to enforce its provisions, questions of fact would necessarily arise and have to be determined and passed upon. And that these questions of fact were such as the citizens or company had a right to demand should be passed upon by a jury and not finally determined by the Interstate Commerce Commission. For we call your attention to the fact that the same Constitution that gave Congress the power to regulate Commerce between the States, provided that "in suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved." The issues involved in this particular case were of such a nature that the defendant companies had a right to demand that they should be passed upon and determined finally by a jury, and *a* accordingly, in pursuance of this constitutional right of these defendants to have the facts finally passed upon by a jury, the case, after all this litigation, comes down to you as the final arbiters of fact.

I need not say to you as jurors that in passing upon the issues of this case and performing your duty toward these defendants—giving them the benefit of the constitutional right of trial by jury—you

should recognize that a just performance of your duty demands you that you lay aside all feeling and prejudice which often arise
262 in questions of this kind, and in an earnest and just spirit of entire fairness, impartiality and cool-headed judgment, you approach this subject with that spirit of even-handed justice and fairness which should always mark the performance of duty by jurors and judges alike. It is this spirit, gentlemen, which gives weight and stability to the work of judges and jurors, and any other is unworthy of the high duty imposed upon judges and jurors of passing upon the rights of their fellow men.

On December 4, 1888, there were in existence two associations, called respectively The Independent Refiners' Association of Titusville, Pa., and The Independent Refiners' Association of Oil City, Pa., which associations were composed of individuals, firms and corporations engaged in the business of refining petroleum oil in the vicinity of those two cities—which, as we have stated, are both located in Western Pennsylvania. Prior to that date these refiners had shipped a certain proportion of their refined product to the seaboard for export. This product had been shipped in barrels by carload lots for some years, and for this service they were charged fifty-two cents per barrel—no charge being made for the barrel or its weight, as is alleged. This oil was carried from the plaintiff's works to Perth Amboy, a New York harbor point, on a through railroad route composed of the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad.

About September, 1888, it is alleged that these two railroads established a joint tariff or rate for barrel shipments of oil at the rate of sixty-six cents, and it is alleged that this rate comprised a charge of fourteen cents for the weight of the barrel or package in which the oil was contained. It is contended that this rate, and upon that point we express no opinion—that is a fact for you to ascertain—that the effect of this rate was to charge fourteen cents for the barrel containing the oil.

263 Now, the Interstate Commerce Act provides that it shall be unlawful for any common carrier (and I ask your particular attention to this language, because it is of vital importance and to be borne in mind), "that it shall be unlawful for any common carrier * * * to subject * * * any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Let me repeat that passage to you, so that you will have its provisions clearly in mind, because it is important in the determination of this case. The Interstate Commerce Act provides that it shall be unlawful for any common carrier to subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

On December 4, 1888, the plaintiff in this case, The Penn Refining Company, Limited, acting with others through the two independent refiners' associations mentioned, presented a petition to the Interstate Commerce Commission alleging that this thirty-six cent barrel rate, which they alleged charged for the weight of the barrel, had been adopted by the Western New York & Pennsylvania Rail-

road Company and the Lehigh Valley Railroad Company from Oil City and Titusville to Perth Amboy, and that—we quote the words of the petition—"said rates and charges for said service are excessive, unjust and unreasonable," and that (we now come to the language of the Act to which we called your attention above) the same "subject your petitioners and their said traffic to an undue and unreasonable prejudice and disadvantage, because, among other things, the rates and charges for said service are practically prohibitory upon the traffic of petitioners to New York harbor localities."

This petition, with two others of through lines to other sea-board localities about New York and Boston, were, by consent of counsel, considered by the Commission together, on the condition that
264 the testimony should "be received in one case with the understanding that it shall apply to the others, so far as it shall be found applicable."

Under this petition, it therefore became the right and the duty of the Commission to receive the testimony upon the issue whether a through and joint rate had been established by these two companies, and whether such rate, if established, did "subject the petitioners and their traffic to an undue and unreasonable prejudice and disadvantage in any respect whatsoever."

The Commission found that prior to September 3, 1888, the rates on the lines in question on shipments of oil both in tank and barrels had been the same for a like quantity of that commodity, exclusive of any charge for the weight of the barrel in barrel shipments; but about that time the rates on barrel shipments were increased 14 cents to New York points and more to Boston points, this additional charge being for the weight of the barrel; and as the rates on tank shipments, not including the weight of the tank or package, were not advanced, but allowed to remain as they were, the result was a discrimination in favor of the tank as against the barrel shipper. The commission further found that the circumstances and conditions regulating the use of barrel and tank shipments were not two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper might take his choice and pay accordingly, but that the cheaper mode of transportation—that is, the tank shipment method—was open only to a certain class of shippers, because the tank cars were owned almost entirely by the shippers and were limited in their use to such owners. The commission found that, "where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments, in the absence of a corresponding charge on tank shipments, re-
265 sulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage."

The Commission accordingly, by an order dated November 14, 1892, directed the Western New York & Pennsylvania Railroad Com-

pany and the Lehigh Valley Railroad Company to desist from charging for the transportation of barrel packages, or to furnish tank cars on request for shipments, and that these companies make reparation for the freight paid on barrels where the use of tank cars has not been open to shippers impartially. They also ordered that the rate on tank and barrel shipments to New York points should not exceed 16½ cents per hundred pounds.

The Commission then proceeded to ascertain the damages sustained by the plaintiff company, and about 1895 (the exact date I — not recall), they filed a report, in which they said:

"We make the following findings and orders upon claims filed and served"—and as far as respects the present company, their finding was as follows:

"The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, The Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof, and the defendant, The Lehigh Valley Railroad Company, the sum of Eight thousand five hundred and seventy-nine dollars ($8,579.00), as reparation for damages resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company, or to its said Receiver, for transportation over the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad
266 from Oil City, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroad between the third day of September; 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York & Pennsylvania Railroad Company and its said Receiver; and the said Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of Eight thousand five hundred and seventy-nine dollars ($8,579.00), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894.

These orders the two companies named, after notice given to them, did not comply with and thereupon, those interested in the order made an application to this Court, sitting as a Court of Law, alleging non-compliance by the companies with the order and praying that a trial of the cause should be ordered. Hence it comes that this case is now before you for trial.

As the right of this Court to assume jurisdiction and of this jury to try the issues depends upon these preliminary steps being taken and the making of these orders by the Interstate Commerce Commission, we have permitted them to be given in evidence before you, but you will understand, gentlemen, that these orders so made by the Commission have no force or effect on your actions. The questions you are to ascertain are to be passed upon by you, under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Inter-

state Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what
267 prior orders have been made by this Interstate Commerce Commission.

We have allowed findings of fact by the Commission; wherever they have found facts, we have allowed those facts to be given in evidence before you; and those findings of fact are to be considered by you. They are *prima facie* evidence of the matters therein stated, for the Act of Congress provides that "at the trial the findings of fact of said Commission shall be *prima facie* evidence of the matters therein stated." By this term "*prima facie*" is meant, gentlemen, that you are to accept such findings of fact as evidence of the matters therein stated, in the absence of proof to the contrary. I trust I have made the distinction quite clear to you: That so far as the findings of fact by this Commission are concerned, they are *prima facie* evidence of the matters therein stated, and they are to be considered by you in making up your verdict.

You will therefore take all the evidence before you, including the facts found by the Commission, the testimony of the witnesses given before you on the stand, and the depositions read in your hearing, and apply that evidence to the determination of the issues involved in this case.

The first question to which you will turn your attention is whether a joint through rate was established and adopted by both the Western New York & Pennsylvania Railroad Company and the Lehigh Valley Railroad Company, as alleged, about 1888, for the carrying of refined oil in barrels from Titusville and Oil City, in the State of Pennsylvania, to Perth Amboy, in the State of New Jersey. The establishment and adoption of such joint through rate between the points in these two States by both of these railroads is a primary fact indispensable and necessary to be found in order that the plaintiff shall recover in this case, and unless you find that such joint through rate was established by both of these
268 roads—such interstate rate—the plaintiff cannot recover, and your verdict should be for the defendants.

If you find that such interstate and joint through rate was established and adopted by both roads for refined oil in barrels, you will next inquire whether this action by the two roads in thus establishing and adopting such interstate joint through rate did, in the words of the Act (and here we come back to the language to which I called your attention) "subject any particular description of traffic—for example, refined oil in barrels—to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

As there is nothing in the Act which defines what undue or unreasonable prejudice or advantage is, or what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law but of fact. They are therefore submitted to you, gentlemen, as a jury, to determine.

In arriving at that conclusion, it is proper to call your attention to this point—that the mere fact that there is or may be a preference or advantage given, where refined oil is shipped in some other way—for example, in tank cars—and that a more favorable rate is given to tank car shippers, does not, in and of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act. Hence it follows that the jury, before it can adjudge these companies to have acted unlawfully, to have subjected refined oil in barrels to any undue or unreasonable prejudice or disadvantage, must ascertain the facts and must give due regard to those facts and matters which railroad men, apart from any question arising under the statute, would treat as calling for a preference or advantage to be given, for example, in this case, to oil shipped in such tanks. All such facts may and ought to be considered and given due weight by the jury in forming its judgment whether such preference or advantage is undue or unreasonable. In the complexity of
269 human affairs, and especially in commercial affairs, absolute uniformity is well nigh impossible, and some prejudice or disadvantage often occurs where men desire to act with the utmost fairness. It is, however, where such prejudice or disadvantage in interstate commerce reaches the measure of undue or unreasonable, that the Act makes it unlawful.

It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs, and justly, fairly and impartially to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established by these two companies (if you find that to be the fact) did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

If you so find, you will also determine to what extent was the rate undue and unreasonable; and whatever amount you so find under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made and on which it has paid the undue and unreasonable amount. You will understand that it is not entitled to recover all the freight it paid, because part of it was undue and unreasonable, but it is only such part of the freight as you find to be undue and unreasonable that the plaintiff is entitled to recover back, and that only upon proof to you of the amount of the shipments made by it upon which the freight was unduly and unreasonably charged.

In this case, you will observe, that you were sworn to try this issue between the plaintiff and four different defendants, to wit, as we have recited to you, the Western New York and Pennsylvania Railroad company, Samuel G. De Coursey, Receiver of that Company, the Western New York and Pennsylvania Railway company, and the Lehigh Valley Railroad Company.

270 On the part of the Lehigh Valley Railroad company it is shown that on February 11, 1892, it leased its road to the Philadelphia and Reading Railroad company, which latter continued to operate it under said lease until August 1, 1893. It is

claimed on behalf of said road that for such period no damage can be found against it or recovered from it. In view of the fact that under the lease in question the Lehigh Valley Railroad company was to be paid by the Reading company a percentage on the gross earnings of the road during the lease, we are of the opinion that the Lehigh Valley Railroad company was not exempt from liability during the lease, if it was chargeable in other respects, and the plaintiff is entitled to recover against it in other respects. In view, however, of the admission of the counsel for the plaintiff that they have shown no shipments during said period and claim no reparation for such, it will be apparent to you that the question as to the giving of this lease need not concern the jury, and I so instruct you.

In regard to the defendants, Samuel G. De Coursey, Receiver, and the Western New York and Pennsylvania Railway Company, it appears that the original company (that is, the Western New York and Pennsylvania Railroad Company) against which this petition was originally filed on December 4, 1888, went into the hands of Samuel G. De Coursey, as receiver, on April 1, 1893. Prior thereto, to wit, on the 14th of November, 1892, an order was made by the Interstate Commerce Commission against the Western New York and Pennsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation.

It is alleged (and upon this point we express no opinion, for you will notice that we leave some facts to be found by you), that thereafter, to-wit, on the twenty-second day of October, 1895, an order was made against the Receiver, Samuel G. De Coursey, among others, directing him, as Receiver of the road, and the
271 Western New York & Pennsylvania Railroad Company to make reparation to the plaintiff of a specific amount, which has been read in evidence before you.

It is alleged that during this proceeding to thus ascertain the amount of reparation to be made, the Receiver was represented by counsel and took part in those proceedings and resisted the entry of the making of such an order. It is also alleged that he was notified of this order of reparation and de-lined to comply with the same.

If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against the Western New York & Pennsylvania Railroad Company, the original company in other respects, and that the said railroad company united, as explained above, in making a thorough joint rate with the Lehigh Valley Railroad Company, and in so doing subjected refined oil in barrels to an undue and unreasonable prejudice or disadvantage, and that when the company ceased to operate its road and it passed into the hands of receiver, such receiver continued to maintain such rate and declined to obey the desisting and reparation orders, and continued the iitigation, then we are of opinion that such acts and the adoption of the rate, the receiver, as receiver, has so acted that he should not be exempt from the verdict that this jury might find, if in other respects the plaintiff is entitled to recover a verdict. And as, under the decree of this Court, under which this road was sold to the Western New York & Pennsylvania Railway Company, the

said company was made liable for liabilities incurred by the receiver, we instruct you that if the plaintiff is entitled, under the foregoing instructions, to a verdict against the receiver, the jury would be warranted in also rendering a verdict against the Western New York & Pennsylvania Railway Company.

Inasmuch as each and every one of the points presented by the several defendants ask us, in each case, to give binding instructions to the jury to find a verdict for the several defendants, we
272 decline to give such peremptory instructions, the points are therefore severally refused, and exception noted for the several defendants presenting the same.

And now, to wit, May 23, 1902, counsel for defendants severally except to the foregoing Charge of the Court to the jury, with leave granted to specify the portions thereof excepted to, upon the filing of the charge.

Verdicts.

No. 23, May Term, 1901:	
May 23d, 1902, Verdict for plaintiff for.....	$12,706.92
No. 25, May Term, 1901:	
May 24, 1902, Verdict for plaintiff for.....	514.30
No. 29, May Term, 1901:	
May 26, 1902, Verdict for plaintiff for.....	741.08

Motion and Reasons for New Trial.

And now, viz., May 24th, 1902, come the defendants above named and by their Counsel moved the Court for a new trial in above entitled case for the following reasons:

First. The Court erred in admitting as evidence the findings of fact of the Interstate Commerce Commission.

Second. The Court erred in over-ruling the objections of defendants' Counsel to the several offers of evidence on the part of the plaintiff.

Third. The Court erred in its general charge to the jury.

Fourth. The Court erred in refusing the several points in writing presented by Counsel for the respective defendants.

273 Fifth. The verdict was not justified under the law upon the evidence presented upon the record of the trial of the above entitled case.

FRANCIS I. GOWEN,
Attorney for The Lehigh Valley Railroad Co.
FRANK RUMSEY,
Attorney for The Western New York & Pennsylvania Railroad Co., and Samuel G. De Coursey, Receiver thereof.
PATTERSON & STERRETT,
Attorneys for The Western New York & Pennsylvania Railway Co.

Motion and Reasons for New Trial.

And now, May 27th, 1902, the Lehigh Valley Railroad Company, one of the said defendants, moves the Court for a new trial, and assigns therefore the following

Reasons.

First. Because the verdict was against the evidence.

Second. Because the verdict was against the weight of the evidence.

Third. Because the verdict was against the law.

Fourth. Because the learned Judge erred in refusing to charge the jury as requested by said defendants first point, which point was as follows:

"To entitle the plaintiff to recover, it must have proven to the satisfaction of the jury that it sustained a loss equal to the amount awarded to it by the Interstate Commerce Commission, because of having been unable to secure tank cars, and of being consequently obliged to ship in barrels the oil covered by the award, and as there is no evidence which would justify the jury in so finding, the verdict should be for the defendant, the Lehigh Valley Railroad Company.

274 Fifth. Because the learned Judge erred in refusing to charge the jury as requested by said defendants' second point, which point was as follows:

"As it is conceded that no oil originated on its line, the Lehigh Valley Railroad Company as a common carrier, was under no obligation to furnish to the plaintiff or to other shippers of oil, cars for the carriage of the same, but it was obliged to receive from the Western New York and Pennsylvania Railroad Company, and transport to Perth Amboy any cars whether box or tank, loaded with oil, which was delivered to it by the Western New York and Pennsylvania Railroad Company, and was entitled to make for such service a reasonable charge; and as the Interstate Commerce Commission has found the rates charged and received by the Lehigh Valley Railroad Company on oil shipped in barrels were reasonable, the plaintiff cannot recover any part of the same, even though the plaintiff may have been obliged to ship in barrels, because of the refusal after demand made of the Western New York and Pennsylvania Railroad Company to furnish tank cars for the same, and the verdict should therefore be for the defendant, the Lehigh Valley Railroad Company."

Sixth. Because the learned Judge erred in refusing to charge the jury as requested by said defendant's third point, which point was as follows:

"The Lehigh Valley Railroad Company, by joining with the Western New York & Pennsylvania Railroad Company in the establishment of a through rate from the point of origin of the oil to Perth Amboy, did not make itself liable to any one injured because

of the unlawfulness of such through rate, except to the extent to which its participation in the same contributed to such injury, and as the award of the Interstate Commerce Commission against the Lehigh Valley Railroad Company upon which this action is founded, went beyond this and charged the Lehigh Valley Railroad Company with the alleged overcharge made by both companies to the
275 through line, the award was not a lawful one, and your verdict should, therefore, be for the defendant, the Lehigh Valley Railroad Company."

Seventh. Because the learned Judge erred in refusing to charge the jury as requested by said defendant's fourth point, which point was as follows:

"The award made by the Interstate Commerce Commission was an unlawful one in that it directed the Lehigh Valley Railroad Company to pay to the plaintiff alleged overcharges for the carriage of its oil made by the Philadelphia & Reading Railroad Company, which, under a lease dated February 11, 1892, operated the railroad of the Lehigh Valley Railroad Company between February 11, 1892, and August 1, 1893, and your verdict, therefore, should be for the defendant, the Lehigh Valley Railroad Company."

Eighth. Because the learned Judge erred in refusing to charge the jury as requested by said defendant's fifth point, which point was as follows:

"If the jury believe, and the evidence to this effect is uncontradicted, that the only shipments made in tank cars over the Lehigh Valley Railroad were those made by members of the association of which the plaintiff was one, then such tank car shipments did not constitute a discrimination against the plaintiff which would support or justify the award made by the Interstate Commerce Commission, and hence your verdict should be for the defendant, the Lehigh Valley Railroad Company."

Ninth. Because the learned Judge erred in refusing to charge the jury as requested by said defendants' sixth point, which point was as follows:

"It affirmatively appears that, in the ascertainment of the amount awarded to the plaintiff, the Interstate Commerce Commission charged the defendants with the amount collected by them on account of the weight of the barrel on the shipments of oil covered by the award without any proof having been adduced or finding
276 of fact made that such shipments were thus made in barrels because of the inability of the plaintiff to procure tank cars. The assessment thus made was erroneous, and the order for the payment of the amount awarded is therefore not a lawful order of the Commission, and the plaintiff cannot therefor recover in this proceeding."

Tenth. Because the learned Judge erred in refusing to charge the jury as requested by said defendants' seventh point, which point was as follows:

"As the plaintiff has not shown the amount of damage, if any that he sustained, by reason of the alleged over-charge made by the defendants upon shipments of oil made, in barrels to Perth

Amboy, during the period covered by the award made by the Interstate Commerce Commission, the verdict should be for defendants."

Eleventh. Because the learned Judge erred in charging the jury as follows:

"The questions you are to ascertain are to be passed upon by you under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this Interstate Commerce Commission.

Twelfth. Because the learned Judge erred in charging the jury as follows:

"We have allowed findings of fact by the Commission; wherever they have found facts, we have allowed those facts to be given in evidence before you; and those findings of fact are to be considered by you. They are *prima facie* evidence of the matters therein stated; for the Act of Congress provides that "at the trial the findings
277 of fact of said Commission shall be *prima facie* evidence of the matters therein stated." By this term *"prima facie"* is meant, gentlemen, that you are to accept such findings of fact as evidence of the matters therein stated, in the absence of proof to the contrary. I trust I have made the distinction quite clear to you; that so far as the findings of fact by this Commission are concerned, they are *prima facie* evidence of the matters therein stated, and they are to be considered by you in making up your verdict.

Thirteenth. The learned judge erred in charging the jury as follows:

"The first question to which you will turn your attention is whether a joint through rate was established and adopted by both the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company, as alleged about 1888, for the carrying of refined oil in barrels from Titusville and Oil City, in the State of Pennsylvania, to Perth Amboy, in the State of New Jersey. The establishment and adoption of such joint through rate between the points in these two States by both of these railroads is a primary fact indespensible and necessary to be found in order that the plaintiff shall recover in this case, and unless you find such joint through rate was established by both of these roads—such interstate rate—the plaintiff cannot recover, and your verdict should be for the defendant."

Fourteenth. Because the learned Judge erred in charging the jury as follows:

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs, and justly, fairly and impartially to determine the ques-

tion of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established by these two companies (if you find that to be the fact) did subject *to* oil
278 shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

If you so find, you will also determine to what extent was the rate undue and unreasonable; and whatever amount you so find under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made and on which it has paid the undue and unreasonable amount."

Fifteenth. Because the learned Judge erred in charging the jury as follows:

"On the part of the Lehigh Valley Railroad Company it is shown that on February 11, 1892, it leased its road to the Philadelphia and Reading Railroad Company, which latter continued to operate it under said lease until August 1, 1893. It is claimed on behalf of said road that for such period no damages can be found against it or recovered from it. In view of the fact that under the lease in question the Lehigh Valley Railroad Company was to be paid by the Reading Company a percentage on the gross earnings of the road during the lease, we are of the opinion that the Lehigh Valley Railroad Company was not exempt from liability during the lease, if it was chargeable in other respects, and the plaintiff is entitled to recover against it in other respects. In view, however, of the admission of counsel for plaintiff- that they have shown no shipments during said period and claim no reparation for such, it will be apparent to you that the question as to the giving of this lease need not concern the jury, and so I instruct you."

Sixteenth. Because the learned Judge erred in overruling the objection of the defendants and in admitting as evidence certain extracts from the opinion and orders of the Interstate Commerce Commission annexed to the plaintiff's petition, claimed to be findings of fact by the Commission.

Seventeenth. Because the learned Judge erred in overrul-
279 ing the motion of counsel for the Lehigh Valley Railroad Company to strike out all extracts from the opinion and orders of the Commission which had been given in evidence as findings of fact of said Commission insofar as this related to the question of the lawlessness and unreasonableness of the charge for the carriage of the barrel package by comparison with the charge made for the shipment of oil in tank cars on the ground that no such issue was raised in any proceeding before the Interstate Commerce Commission to which the Lehigh Valley Railroad Company was a party, and that therefore such alleged findings of fact and orders can have no relevancy to or cannot be used as evidence against that company.

FRANCIS I. GOWEN,
Attorney for Lehigh Valley Railroad Company.

280 And now, viz, May 24th, 1902, came the defendants above named and by their counsel move the Court for a new trial in above entitled case for the following reasons:

1. The Court erred in admitting in evidence the findings of fact of the Interstate Commerce Commission.
2. The Court erred in overruling the objections of defendants' counsel to the several offers of evidence on the part of plaintiff.
3. The Court erred in its general charge to the jury.
4. The Court erred in refusing the several points in writing presented by counsel for the respective defendants.
5. The verdict was not justified under the law upon the evidence presented upon the record of the trial of the above entitled case.

STETSON, JENNINGS & RUSSELL,
Counsel for N. Y., L. E. & West R. R. Co.; for J. G. McCullough and E. B. Thomas, as Receivers; for the Erie Railroad Co.

PATTERSON & STERRETT,
For The W. N. Y. & P. Ry. Co.

FRANK RUMSEY,
For W. N. Y. & P. R. R. and Samuel G. De Coursey, Receiver Thereof.

D. H. WILCOX, *For D. & H. Co.*

281 *Motion and Reasons for New Trial.*

And now, to-wit: May 27th, 1902, counsel for all the defendants in the above entitled case respectfully move the Court for a new trial in above entitled case for the following

Reasons.

1. The Court erred in admitting in evidence the findings of fact of the Interstate Commerce Commission.
2. The Court erred in overruling the objections of defendants' counsel to the various offers of evidence of the plaintiff.
3. The Court erred in refusing the several points presented in writing on behalf of the respective defendants.
4. The Court erred in its general charge to the jury in the several matters excepted to by defendants' counsel.
5. The verdict in above entitled case was not justified under the evidence and the law applicable to this case.

____ ____,
Counsel for Western New York & Pennsylvania Railway Company.

____ ____,
Counsel for Western New York & Pennsylvania Railroad Co. and Samuel G. De Coursey, Receiver Thereof.

____ ____,
Counsel for the Fitchburg Railroad Company and the Boston & Maine Railroad Company.

282 *Opinion of the Court Sur Motion for New Trial.*

BUFFINGTON, *J.:*

As by reference to the charge of the court a full statement of the parties to this case, their relation to each other and the general features of the controversy will be found, it is needless to here repeat them. Each of the points submitted by the several defendants and which were denied prayed peremptory instructions in their favor respectively. In disposing of this motion, we address ourselves to two principal questions:

First. Can the Lehigh Valley Railroad Company, the terminal carrier, be held for the reparation due the plaintiff?

Second. Can the Western New York & Pennsylvania Railway Company, the successor of the Western New York & Pennsylvania Railroad Company, the initial carrier, be held for the reparation due the plaintiff?

The Inter-state Commerce Act, Section 3, provides: "That it shall not be unlawful for any common carrier * * * to subject * * * any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," and the eighth section provides: "in case any common carrier, subject to the provisions of this act, shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, * * * such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation." The question whether the two carriers, the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company united in establishing a joint rate and whether such rate subjected the traffic in question to undue prejudice or disadvantage, was submitted to the jury as one of fact. This was in accord with the views of the
283 Supreme Court: "as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law but of fact;" Texas & Pacific Railway Company *vs.* Interstate Commerce Commission, 162 U. S. 219. The verdict of the jury has established the fact that the Lehigh Valley Railroad Company joined in establishing this joint rate and that such rate was an unreasonable prejudice or disadvantage. Such being the case the 8th section, quoted above, made both participating carriers "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation." It needs no argument to show that the terminal carrier who had previously agreed and united with the initial one in fixing an unlawful joint rate and who subsequently united in sharing it in fixed proportions was "doing, causing to be done or permitting to be done" that which the act declared to be unlawful, and that in so doing it became "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation," for the statute so says. It is contended the terminal carrier was not liable for the damage sustained

by a shipper because it was bound to receive and forward cars delivered to it by the initial one. Assuming the law compels the terminal carrier to receive and forward, there is no law or obligation that compels or enables it before the receipt of the freight to join with the initial one in establishing an unlawful joint rate. "No power existed at common law and none is given by the act to the court or commission to compel connecting companies to contract with each other, to abandon full control of their separate roads or to unite in a joint tariff," Chicago, etc., Railway Company *vs.* Osborne, 10 U. S. C. C. App., 434. If the terminal carrier aids in establishing an unlawful joint rate and shares in the freight thereby exacted, it should not and cannot escape responsibility for the damage caused
284 by its unlawful act through the mere fact that its service was rendered at the end instead of the beginning of the route. Its liability therefor does not rest on partnership or contractual relation—of which the St. Louis Insurance Company *vs.* St. Louis, etc., Railroad Company, 104 U. S., 146; Myrich *vs.* Michigan Central Railway Company, 107 U. S., 102; Sumner *vs.* Walker, 30 Federal Reporter, 261, are instances—but it is founded on its branch of public duty. That breach and the consequent injury constitute a wrong which, being independent of contract, is in the nature of a tort. Not only does the statute make every one doing, causing or permitting such unlawful thing to be done, liable to the party injured for the full amount of the damage, but the principle is well established that tort feasers are jointly liable; Cooley on Torts, page 135. Under the facts the verdict against the Lehigh Valley Railroad company was warranted.

The second question concerns the liability of the Western New York and Pennsylvania Railway Company. There was evidence showing that the Western New York and Pennsylvania Railroad company, the predecessors of that company was one against which the original petition to the Interstate Commerce Commission was filed on December 4, 188; that on November 14, 1892, an order was made by the commission directing it to desist from the joint rate in question and to make reparation for its prior enforcement. On April 1, 1893, the Court appointed a receiver for said company. The order to desist was not obeyed by either the Western New York and Pennsylvania Railroad Company or by its Receiver. The latter continued to act as receiver until October 22, 1895, when the final order of reparation was made assessing damages in this case at $8,579, for alleged unlawful freight charges between September 3, 1888, and May 15, 1894. In this order the Receiver was specially included and it further appears that during the proceedings leading up to it he appeared by counsel and took part in the hear-
285 ings, before the commission. From these facts it is apparent that when the receiver was appointed the unlawful tariff was in force, that it had been already declared so and the company ordered to desist; that the Receiver continued to contest this order and did not obey it. Certainly, therefore, by continuing to exact freight thereunder he came within the perview of the 8th section of the act as doing, causing or permitting to be done a thing prohibited

and thereby became "liable to the person or persons injured thereby for the full amount of the damages sustained in consequence of any such violation of the provisions of the act." All who aid or abet in committing a tort or who unlawfully take the benefit of its commission are liable; Berry *vs.* Fletcher, 1st Dillon, 67; Federal cases No. 1357, Welsh *vs.* Cooper, 8 Pa. St., 217; Judson *vs.* Cook, 11 Barber (N. Y.) 642; Irvine *vs.* Wood, 51 N. Y., 230; Horton *vs.* Heistley, 1st Ired., 165; Cooley on Torts, page 127, and where a tort is continued in its nature, he who continues, as well as he who originates may be joined in an action for damages; Wood's Law of Nuisances, section 838; Irvine *vs.* Wood, *supra.;* Cobb *vs.* Smith, 38 Wis., 33. In view of these proofs and the opinion of this court on the demurrer, Interstate Commerce Commission *vs.* Western New York and Pennsylvania Railroad Company, 82 Federal Reporter, 192, there was ample ground to submit to the jury the question of the Receiver's liability. Such liability being established and the order of this court of October 18, 1894, for the sale of the road having provided: "such sale to be subject * * * to all the debts and liabilities of the Receiver * * * such debts and liabilities, if any, still remain a lien upon the premises until discharged," the court rightfully instructed the jury "if the plaintiff is entitled under the foregoing instructions to a verdict against the Receiver, the jury will also be warranted in rendering a verdict against the Western New York and Pennsylvania Railway Company."

286 After full consideration we are of opinion the case was fairly tried, the verdict justified by the evidence and the motion for a new trial should be refused. It is so ordered and the clerk will enter judgment on the verdict.

No. 25, May Term, 1901.

BUFFINGTON, *J.:*

The questions pertinent to this motion have been disposed of in an opinion filed at No. 23 May Term, 1901. In accordance with the views there expressed (such opinion being made part hereof by reference) we hold no ground is shown for the grant of a new trial. It is therefore refused in the present case. The clerk will enter judgment on the verdict.

No. 29, May Term, 1901.

BUFFINGTON, *J.:*

The questions pertinent to this motion have been disposed of in an opinion at No. 23 May Term, 1901. In accordance with the views there expressed (such opinion being made part hereof by reference) we hold no ground is shown for the grant of a new trial. It is, therefore, refused in the present case. The clerk will enter judgment on the verdict.

287 *Petition for Appeal.*

To the Honorable the Judges of the said Court:

The above defendants, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver thereof, the Western New York and Pennsylvania Railway Company, and the Lehigh Valley Railroad Company, conceiving themselves to be aggrieved by the judgment of the Court entered on the 12th day of February, 1903, in the above entitled case, do hereby appeal from said judgment, and remove the same by writ of error to the United States Circuit Court of Appeals for the Third Circuit, and they pray that this writ of error may be allowed and that a transcript of the record and proceedings and papers upon which said judgment was entered, duly authorized, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

PATTERSON, STERRETT & ACHESON,
Attorneys for Plaintiffs in Error.

And now, to-wit, March 2, 1903, it is ordered that the writ of error be allowed as prayed for.

JOSEPH BUFFINGTON, *Judge.*

288 *Assignments of Error.*

The Lehigh Valley Railroad Company, one of the defendants, assigns for error the following:

First. The learned Court erred in refusing to charge the jury as requested by said defendant's first point, which point was as follows:

"To entitle the plaintiff to recover, it must have proven to the satisfaction of the jury that it sustained a loss equal to the amount awarded to it by the Interstate Commerce Commission, because of having been unable to secure tank cars and of being consequently obliged to ship in barrels the oil covered by the award, and as there is no evidence which would justify the jury in so finding, the verdict should be for the defendant, the Lehigh Valley Railroad Company."

Second. The learned Court erred in refusing to charge the jury as requested by said defendant's second point, which point was as follows:

"As it is conceded that no oil originated on its line, the Lehigh Valley Railroad Company as a common carrier was under no obligation to furnish to the plaintiff or to other shippers of oil, cars for the carriage of the same, but it was obliged to receive from the Western New York and Pennsylvania Railroad Company and transport to Perth Amboy any cars, whether box or tank, loaded with oil, which were delivered to it by the Western New York and Pennsylvania Railroad Company, and was entitled to make for such service a reasonable charge; and as the Interstate Commerce Commission has found the rates charged and received by the Lehigh Valley Railroad Company on oil shipped in barrels were reasonable, the plain-

tiff cannot recover any part of the same, even though the plaintiff may have been obliged to ship in barrels because of the refusal after demand made of the Western New York and Pennsylvania Railroad Company to furnish tank cars for the same, and the verdict
289 should therefore be for the defendant, the Lehigh Valley Railroad Company."

Third. The learned Court erred in refusing to charge the jury as requested by said defendant's third point, which point was as follows:

"The Lehigh Valley Railroad Company, by joining with the Western New York & Pennsylvania Railroad Company in the establishment of a through rate from the point of origin of the oil to Perth Amboy, did not make itself liable to anyone injured because of the unlawfulness of such through rate, except to the extent to which its participation in the same contributed to such injury, and as the award of the Interstate Commerce Commission against the Lehigh Valley Railroad Company, upon which this action is founded, went beyond this and charged the Lehigh Valley Railroad Company with the alleged overcharges made by both companies to the through line, the award was not a lawful one, and your verdict should, therefore, be for the defendant, the Lehigh Valley Railroad Company."

Fourth. The learned Court erred in refusing to charge the jury as requested by said defendant's fourth point, which point was as follows:

"The award made by the Interstate Commerce Commission was an unlawful one in that it directed the Lehigh Valley Railroad Company to pay to the plaintiff alleged overcharges for the carriage of its oil made by the Philadelphia & Reading Railroad Company, which, under a lease dated February 11, 1892, operated the railroad of the Lehigh Valley Railroad Company, between February 11, 1892, and August 1, 1893, and your verdict, therefore, should be for the defendant, the Lehigh Valley Railroad Company."

Fifth. The learned Court erred in refusing to charge the jury as requested by said defendant's fifth point, which point was as follows:

290 "If the jury believe, and the evidence to this effect is uncontradicted, that the only shipments made in tank cars over the Lehigh Valley Railroad were those made by members of the association of which the plaintiff was one, then such tank car shipments did not constitute a discrimination against the plaintiff which would support or justify the award made by the Interstate Commerce Commission, and hence your verdict should be for the defendant, the Lehigh Valley Railroad Company.'

Sixth. The learned Court erred in refusing to charge the jury as requested by said defendant's sixth point, which point was as follows:

"It affirmatively appears that, in the ascertainment of the amount awarded to the plaintiff, the Interstate Commerce Commission charged the defendants with the amount collected by them on account of the weight of the barrel on the shipments of oil covered by the award without any proof having been adduced or finding of fact made that such shipments were thus made in barrels because of the

inability of the plaintiff to procure tank cars. The assessment thus made was erroneous, and the order for the payment of the amount awarded is therefore not a lawful order of the Commission, and the plaintiff cannot therefore recover in this proceeding."

Seventh. The learned Court erred in refusing to charge the jury as requested by said defendant's seventh point, which point was as follows:

"As the plaintiff has not shown the amount of damage, if any that he sustained by reason of the alleged overcharge made by the defendants on shipments of oil made in barrels to Perth Amboy during the period covered by the award made by the Interstate Commerce Commission, the verdict should be for the defendants."

Eighth. The learned Court erred in charging the jury as follows:

291 "The questions you are to ascertain are to be passed upon by you under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this Interstate Commerce Commission."

Ninth. The learned Court erred in charging the jury as follows:

"We have allowed findings of fact by the Commission; wherever they have found facts, we have allowed those facts to be given in evidence before you; and those findings of facts are to be considered by you. They were *prima facie* evidence of the matters therein stated; for the Act of Congress provides that 'At the trial the findings of fact of said Commission shall be *prima facie* evidence of the matters therein stated.' By this term '*prima facie*' is meant, gentlemen, that you are to accept such findings of fact as evidence of the matters therein stated, in the absence of proof to the contrary. I trust I have made the distinction quite clear to you; that so far as the findings of fact by this Commission are concerned, they are *prima facie* evidence of the matters therein stated, and they are to be considered by you in making up your verdict."

Tenth. The learned Court erred in charging the jury as follows:

"The first question to which you will turn your attention is whether a joint through rate was established and adopted by both the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company, as alleged, about 1888, for the carrying of refined oil in barrels from Titusville and Oil

292 City in the State of Pennsylvania, to Perth Amboy, in the State of New Jersey. The establishment and adoption of such joint through rate between the points in these two States by both of these railroads is a primary fact indispensable and necessary to be found in order that the plaintiff shall recover in this case, and unless you find such joint through rate was established by both of

these roads—such interstate rate—the plaintiff cannot recover, and your verdict should be for the defendants."

Eleventh. The learned Court erred in charging the jury as follows:

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proof, and justly, fairly and impartially to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established by these two companies (if you find that to be fact) did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. If you so find, you will also determine to what extent was the rate undue and unreasonable; and whatever the amount you so find, under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made and on which it has paid the undue and unreasonable amount."

Twelfth. The learned Court erred in charging the jury as follows:

"On the part of the Lehigh Valley Railroad Company, it is shown that on February 11, 1892, it leased its road to the Philadelphia & Reading Railroad Company, which latter continued to operate it under said lease until August 1, 1893. It is claimed on behalf of said road that for such period no damages can be found against it or recovered from it. In view of the fact that under the lease in question the Lehigh Valley Railroad Company was to be paid by the Reading Company a percentage on the gross earnings of
293 the road during the lease, we are of opinion that the Lehigh Valley Railroad Company was not exempt from liability during the lease, if it was chargeable in other respects, and the plaintiff is entitled to recover against it in other respects. In view, however, of the admission of counsel for plaintiff that they have shown no shipments during said period and claim no reparation for such, it will be apparent to you that the question as to the giving of this lease need not concern the jury, and so I instruct you."

Thirteenth. The learned Court erred in admitting the evidence against the objection of the defendants that they were not Findings of Fact and in other respects were irrelevant and incompetent, certain portions of the Report and Opinion of the Interstate Commerce Commission claimed to be Findings of Fact, as follows:

Before the Interstate Commerce Commission.

(No. 153.)

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PENNSYLVANIA, and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA,

vs.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, THE DELAWARE AND HUDSON CANAL COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON AND MAINE RAILROAD COMPANY.

(No. 154.)

SAME

vs.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, and THE LEHIGH VALLEY RAILROAD COMPANY.

294

(No. 163.)

SAME

vs.

THE PENNSYLVANIA RAILROAD COMPANY and THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

Complaints filed in first two cases Dec. 4, 1888, and in third case, Jan. 30, 1889. Answers filed, Dec. 26, 1888, to Feb. 28, 1889. Heard at Titusville, Pennsylvania, May 15, 1889. Briefs filed Feb. 11, 1890, to Sept. 23, 1891. Decided November 14, 1892.

"These three cases were heard together and may be disposed of at the same time." (Page 59 of Plaintiff's Petition and Exhibits.)

"The Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, the complainants in each case, are composed of separate and distinct companies engaged in the manufacture and sale of refined petroleum and products of petroleum at works owned and operated by them in the oil regions of Pennsylvania at or near said cities of Titusville and Oil City." (Page 60.)

"The leading questions raised by the pleadings in these cases relate, (1), to the lawfulness of the charge for the barrel package under the circumstances and conditions disclosed by the evidence; * * *" (Page 73.)

"The defendants transport oil in bulk in tank cars and in wooden barrels in box or rack cars. Prior to September 3, 1888, the rates over the lines of the defendants on shipments of oil both in tanks and barrels had been the same for a like quantity of the commodity

exclusive of any charge for the weight of the barrel in barrel shipments, but about that time the rates on barrel shipments were increased about fourteen cents to New York points and more
295 to Boston points, this additional charge being for the weight of the barrel, and as the rates on tank shipments, not including the weight of the tank or package, were not advanced but allowed to remain as they were, the result was a discrimination in favor of the tank as against the barrel shipper. The question is whether that discrimination is in the language of the statute an 'unjust discrimination.'"

The defendants set up several matters in excuse or justification of their action in this matter. They claimed, in the first place, that in originally making the additional charge for the barrel package they did so in compliance with what they conceived to be the ruling of this commission in reference thereto in the case of Rice *vs.* Louisville & N. R. R. Co., 1 Inters. Com. Rep. 722, 1 I. C. C. Rep. 503. This point is fully discussed in the case of Rice, Robinson & Witherop, and it is made clear that not only no warrant for the action of the carriers proceeded against in the present cases is found in any ruling of this commission, but also that said action is in disregard of the "principle plainly and emphatically laid down by the commission" in said case of Rice and also in the subsequent case of Scofield *vs.* Lake Shore & M. S. R. R. Co., 2 Inters. Com. Rep. 67, 2 I. C. C. Rep. 90. If it be conceded that in the language used by the commission in said cases there was some color for the original institution of the discrimination arising from the charge for the weight of the barrel, yet no authority for the continuance of that discrimination can be predicated of such language since the issuance by the commission and communication to the carriers of the memorandum entitled "Relative Tank and Barrel Rates on Oil;" 2 Inters. Com. Rep. 245, 2 I. C. C. Rep. 365, in which it was declared that the action of the carriers in this particular was unwarranted by the decisions in said cases.

Having instituted the discrimination in order, as they allege, to bring their practice into conformity with what they con-
296 sidered to be the rulings of this commission, the carriers now seek to justify and maintain this departure from their former custom of long standing on other grounds.

It is claimed that in case of special facilities at loading and unloading points, the tank cars are handled more rapidly than cars carrying oil in barrels. This may be true, but the testimony is that the railroads should provide these facilities, and there are none at the seaboard of which the complainants can avail themselves. When special facilities for loading and unloading tank cars are not available, greater delay occurs than in loading and unloading barrel cars. It is further set up by the carriers in justification of the charge by the barrel package, that the barrel belongs to the shipper, and is an article of merchandise, and when shipped from the oil regions to the seaboard sells for an advance over cost in the oil region equal to the freight paid on the barrel. They estimate the cost of the barrel in the oil region without the manufacturer's profit at from

$1.11 to $1.16 and the selling price in New York at from $1.30 to $1.32½ per barrel, which would be a profit somewhere greater than the amount of the freight charge of fourteen cents. This estimate, however, only includes the cost of the barrel as received from the barrel maker, and ignores the further cost incurred by the refiner in preparing the barrel as a receptacle of oil. After the barrel is received from the manufacturer, the refiner has to paint it on the outside, coat it with glue within, put in a bunghole and provide a bung, plug worm-holes, recooper the barrel and see that it is perfectly tight. The proof shows that the cost of the labor and material for this preparation of the barrel is from sixteen cents to seventeen cents per barrel, and that is added to the original cost as received from the manufacturer, makes the total cost per barrel to the refiner from $1.30 to $1.32½, the selling price in New
297 York.

The total cost of the barrel and its preparation to the refiner at Titusville and Oil City is shown by the following itemized statements, the first being made at Oil City, and the second at Titusville.

I.

New Barrels with heavy iron for export	1.16
Labor in coopering, gluing, painting and loading on cars per Barrel	.055
Glue per bbl	.065
Paint, Rosin, Naphtha, &c., per bbl	.020
Bungs, Stencils, Brushes, Repairs to machinery and buildings, Steam, &c	.025
Total per bbl	$1.325

New barrels, heavy hoops, average price	$1.13
Total labor, per barrel	.06
Glue, per barrel	.06
Paint, rosin, naphtha, per barrel	.02
Bungs, rivets, iron, plugs, per barrel	.005
Stencils, brands, brushes, brooms, etc., per bbl	.005
Tools, utensils, fillers, hose and machinery	.02
Total per barrel	$1.30

If sold in New York or paid for as part of the consignment, the barrel does not bring more than its cost to the shipper, and when returned empty it is at the shipper's expense. Moreover, as is said in the Rice, Robinson & Witherop case "in the carriage of oil the barrel is not shipped as merchandise, but as a package or means of transportation of the oil." 3 Inters. Com. Rep. 162, 4 I. C. C. Rep. 152.

It is also maintained that the transportation in tanks yields the carrier a larger revenue above the cost of service than that in barrels.

In support of this contention, tables showing dead and paying weight hauled in tank cars carrying oil in bulk and in box cars carrying oil in barrels, respectively, were introduced in evidence on the part of the defendants, and it appears therefrom that the amount
298 of paying freight hauled in the average tank car is greater than that in the average car loaded with barrels, and that in consequence the revenue to the carrier is somewhat greater in the former case than in the latter, even when the barrel package is charged for, and is, of course, still greater where no charge is made for the barrel package. It is claimed by one of the witnesses that at the present rate of 16½ cents per 100 pounds to New York points, the carrier would receive on an average train load, the barrel package being charged for, $35.76 more for the transportation of oil in tanks than in barrels, and excluding the charge for the barrel package, $237.20 more. Without affirming the strict accuracy of these table- and estimates, it may be conceded the evidence shows the amount of paying freight to be materially greater in tank shipments than in barrel shipments. In the case of Scofield *vs.* Lake Shore & M. S. R. R. Co., 2 Inters. Com. Rep. 67, 2 I. C. C. Rep. 90, it was found that "the tank car taking the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with the full load." 2 Inters. Com. Rep. 7, 2 I. C. C. Rept. 103.

This plea that the transportation in tanks is the more profitable to the carrier in yielding a larger revenue above the expense of service was presented in the case of Rice, Robinson & Witherop and was in effect held to be no justification of the discrimination between tank and barrel shippers under the circumstances and conditions regulating the use of the two modes of transportation. These circumstances and conditions do not present a case of two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper may take his choice and pay accordingly, but a case where the cheaper-rated and, as is claimed by the defendants, the better, mode of transportation is available practically to only a particular class of shippers. The railroads do not to any material extent
299 own tank cars or furnish facilities for loading and unloading them, but they are owned almost entirely by the shippers and limited in their use to such owners. (Pages 75, 76, 77, 78, 79, and part of 80.)

"The tank of the tank car performs the function of a package in tank shipments as the barrel does in barrel shipments." (Page 83.)

"The carrier, in renting and paying mileage for the tank car, furnishes the tank shipper a package and free transportation thereof; the barrel shipper furnishes his own package and is charged for its transportation. At 14 cents a barrel on the minimum car load of 60 barrels, the discrimination against the barrel shipper amounts to $8.40 equivalent to freight at tank rates on over 17 barrels of oil. The average distance from Oil City and Titusville to New York harbor points by the railway lines between these points is over 500 miles. The mileage paid per car for round trip at ¾

cents per mile amounts to over $7.50. The tank shipper, therefore, receives about $7.50 per round trip for the use of his car including a package for his oil, while the barrel shipper pays $8.40 per car for the transportation of his package one way.

The cost of the tank car is from $600 to $634; it requires special facilities for loading and unloading, has to be cleaned out after use to render it fit for carriage of different qualities of oils and carries no return loads from the east. Barrelled oil is transported in box and rack cars; the box cars generally used for that purpose are old and inferior, unfit for the transportation of merchandise in general and new box cars are seldom so used, as the leakage and odor of the oil are calculated to render them unsuitable for the carriage of freight liable to be damaged thereby. The box car costs about $450. It is estimated and the evidence tends to show that from five to ten per cent. of the cars used in carrying oil in barrels return loaded.

A statement introduced in evidence, dated Oct. 1, 1889, shows that the total tank car equipment of the United States so
300 far as then known was 7,864 cars, owned and operated as follows:

Owned by railroads		1,342
Owned by companies and individuals not connected with the Standard Oil Company (approximately)		1,844
Leased by Standard Oil Company to outside parties		300
Total operated by parties not connected with Standard Oil Company (approximately)		3,486
Owned by Standard Oil Company	4,497	
Less leased to others	300	
Total operated by Standard Oil Company		4,197
Owned in part by Standard Oil Company		181
		4,378
Total tank car equipment		7,864

From this it will be seen that the Standard Oil Company owns and operates over half of the total tank car equipment of the United States. The complainants manufacture refined petroleum and its products at or near Oil City and Titusville and sell the same in the domestic markets and at the Atlantic seaboard for export. They do this business in competition with the Standard Oil Company and others. The capacity of the refineries of the complainants is about two million barrels per annum, and their actual shipments for the year 1888, were about a million and a half barrels of petroleum products. The shipments were entirely by rail and for the most part in barrels." (Pages 84 and 85.)

"The fact that the Standard Oil Company owns and operates more than half of the total tank car equipment of the United States,

would seem to justify the inference that its gain is largely greater than its loss by the discrimination in favor of tank shipments.

In the statement above of the total tank car equipment of the United States, 1,342 is the number given as owned by railroad companies. Of these 1,130 belong to the Pennsylvania Rail-
301 road Company, leaving 212 as the number owned by all other railroads in this country. Practically, then, with the exception of the Pennsylvania Railroad Company, the defendants carry oil in tank cars for such shippers only as own the cars and supply them to the roads." (Pages 87 and 88.)

"After full investigation and mature consideration, our conclusion in reference to the charge for the barrel package is in line with that in the case of Rice, Robinson & Witherop, and with the principles pertinent to the question laid down in that case and in the case of Rice and Scofield and we hold that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment, and destination, than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions had been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers." (Pages 90 and 91.)

"The defendants in the case against the Western New York & Pennsylvania Railroad Company, the New York, Lake Erie & Western Railroad Company, the Delaware & Hudson Canal Company, the Fitchburg Railroad Company, and the Boston and Maine Railroad Company form a route over which petroleum products are transported in car-loads from the Pennsylvania oil regions to Boston and New England points; the defendants in the case, the Western New York & Pennsylvania, the New York, Lake Erie & Western Railroad Company, and the Lehigh Valley Railroad Company form a route over which such transportation is con-
302 ducted from such oil regions to New York harbor points." (Page 92.)

"In many instances the same railroad forms a link in several routes. The Western New York & Pennsylvania Railroad is the initial carrier in each of the three routes formed by the roads complained against and is also the initial carrier in most of said other routes. All these routes form two classes; one composed of those carrying for the New England trade or Boston points, and the other, of those carrying for New York harbor and vicinity, mainly for export. Each class, respectively, maintains the same rates. Those rates, so far as shown by tariffs on file with this Commission up to date have been as follows:

(Page 94 of Plaintiff's Petition and Exhibits.) (See page 14.)

Beginning at January, 1885, the open rate of 52 cents was paid

without any rebate, and from January, 1886, to September 3, 1888, the rate by all lines to New York was generally 53 cents per barrel, but there is evidence tending to show that in 1886 there was a rate of 60 cents to Jersey City." (Page 95.)

"About 1881, two pipe lines for conveying crude oil from the Pennsylvania oil regions to the Seaboard were completed. The Tide Water Pipe Line and that of the National Transit Company. The Tide Water Pipe Line was first constructed. Both these pipe lines are carriers of crude oil between the points named and originally were in competition with each other and with the rail line. The low rates prevailing by rail from about 1881 to about January 1885 are, it is claimed, attributable to this competition. Under this competition the rates reached a very low if not unremunerative figure, both by pipe and rail, and about December, 1883, the pipe line with the view of getting better rates adjusted their differences and the competition between them ceased. The pipe line business appears then to have passed into the control of the
393 National Transit Company. The Pennsylvania Railroad Company, about 1885, entered into the contract with the National Transit Company, which, as set forth in the complaint against the Pennsylvania Company, is a contract for the pooling or division of the traffic on oil between the Pennsylvania Company and the National Transit Company, one consideration of which contract was the maintenance of the same rates on oil by the railroad and by pipe line and under and by virtue of which the said National Transit Company guarantee to the Pennsylvania Railroad Company twenty-six per cent. of the entire oil traffic from the Pennsylvania oil regions to tidewater.' The Pennsylvania Railroad Company admits the contract substantially as stated by the complainants, but avers 'that the sole purpose of it was to secure and maintain a reasonable and compensatory rate to itself for the service to be rendered; that the rates now charged are only reasonable and just and that it would be impossible to carry said traffic at a lower rate without entailing upon itself unreasonable loss.' The evidence tends to show that under this contract the rate of 52 cents per barrel for tank and barrel shipments was put in force both by the pipe lines and by the Pennsylvania Company and was thereupon adopted by all the class of lines to New York harbor points. September 3, 1888, notice was given of an advance of 14 cents per barrel for the weight of the barrel on barrel shipments to become effective September 13, 1888, making the rate on such shipments 66 cents per barrel.

Tariffs issued by Western N. Y. & Penna. R. R. Joint with following lines:		To New York from Titusville and Oil City.		To New York Harbor points.					
				To Jersey City from Titusville and Oil City.		To Perth Amboy from Titusville and Oil City.		To Communipaw from Titusville and Oil City.	
		In bbls.	In T. cars.	In bbls.	In T. cars.	In bbls.	In T. cars.	In bbls.	In T. cars.
N. Y. Lake Erie & West'n R. R.									
November 10, 1887.	Per Bbl.			58	(From			52	(From
March 3, 1888.	" "			52	Titusville.)				Titusville.)
September 3, 1888.	Per 100 lbs.			16½	16½				
October 17, 1889.		18½	18½						
West Shore R. R.									
April 23, 1887.	Per Bbl.	58		58				52	
July —, 1887.	" "								52
September 3, 1888.	Per 100 lbs.	18½	18½						
February 10, 1892.	" " "	19½	19½						
D. L. & W. and Delaware & Hudson Canal Co.'s R. R.									
December 15, 1888.	" " "	18½	18½	18½	18½	16½	16½		
NOTE.—Rates withdrawn Oct. 24, 1891.									
Lehigh Valley R. R.									
September 3, 1888.	" " "	18½	18½						
NOTE.—Rates to New York withdrawn October 20, 1891.									
Issued by Pennsylvania Railroad. (Green Line.)									
April 8, 1887.	Per Bbl.							52	52
February 20, 1888.	" "			52	52	52	52	52	52
September 3, 1888.				66	52	66	52	66	52

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05 On the basis of the estimated or constructive weight placed by the carriers on oil by the gallon in tank shipments and on he barrel and its contents in barrel shipments (which weights will be onsidered further on), both the 52 cents rate and the 66 cents rate mounted (when they were adopted) to 16½ cents per hundred ounds of oil transported." (Pages 96 and 97.)

"It is further ordered that the defendants cease and desist from harging or collecting any rate or sum for the transportation of the arrel package on shipments of oil in barrels over their roads or lines rom the oil regions of Western Pennsylvania to New York and New ork harbor points or to Boston and Boston points; or, on reasonable otice, promptly furnish tank cars to complainants, and others who ay apply therefor, for the purpose of loading and shipping oil herein to such New York harbor and Boston points as the shipper ay direct; and that said defendants notify the public accordingly y publication in their tariff of rates and charges, pursuant to the rovisions of section 6 of the Act to regulate commerce, and also file opies of said tariffs with this commission, as required by the provisions of said section. It is further ordered that the rate on shipents of oil both in tanks and in barrels over said roads shall be the ame, and said rate from said oil regions to New York points shall ot exceed 16½ cents per hundred pounds and to Boston and Boston oints shall not exceed 23½ cents per hundred pounds; and the deendants are required to refund to the several parties legally entitled hereto, within sixty days after notice of this decision and demand hereof by such parties, all sums received by them for transportation ver their roads of the barrel package on shipments of oil in barels, when the use of the tank cars has not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use." (Pages 122 and 123.)

06 "Inasmuch as the amounts wrongfully received from the complainants respectively cannot be ascertained from the evience already taken, the proceedings will be continued for such urther action or inquiry in that behalf as may become necessary." Page 123.)

"Upon the facts herein, we are forced to the conclusion that the nly practical remedy for the unjust discrimination now existing is o give defendants the alternative of abolishing the charge for the arrel, and in so doing we are only permitting them to return to a ractice which they followed during a long period, which they only iscontinued under a mistaken construction of our original Rice deision, and which they now seek to justify on wholly different rounds." (Page 125.)

Fourteenth. The learned Court erred in overruling the motion of ounsel for the Lehigh Valley Railroad Company to strike out all xtracts from the opinion and orders of the Commission which had een given in evidence as findings of fact of said Commission in so ar as these related to the question of lawfulness and unreasonableess of the charge for the carriage of the barrel package by comparison with the charge made for the shipment of oil in tank cars hat no such issue was raised in any proceeding before the Interstate

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Commerce Commission to which the Lehigh Valley Railroad Company was a part, and that therefore such alleged findings of fact and orders can have no relevancy to or cannot be used as evidence against that Company.

Fifteenth. The learned Court erred in admitting in evidence against the objection of the defendants, Paragraph 1 of the Plaintiffs' Petition in this case, which paragraph is as follows:

"That the Western New York and Pennsylvania Railroad Company is a corporation organized under the laws of New York and Pennsylvania, having its principal office at Philadelphia,
307 Pennsylvania, and that Samuel G. De Coursey has been and still is receiver thereof; but as your petitioner is informed and believes, and so states, the railroad properties heretofore owned by the said Western New York and Pennsylvania Railroad Company are now and since on or about March 31, 1895, have been owned, controlled and operated by the Western New York and Pennsylvania Railroad Company, a corporation organized under the laws of New York and Pennsylvania, having its principal office at Philadelphia, Pennsylvania; that the New York, Lake Erie and Western Railroad Company is a corporation organized under the laws of New York, having its principal office in New York City, New York, and that J. G. McCullough and E. B. Thomas have been and still are receivers thereof; but as your petitioner is informed and believes, and so states, the railroad properties heretofore owned, controlled or operated by the said New York, Lake Erie and Western Railroad Company are now and since on or about November 20, 1895, have been owned, controlled or operated by The Erie Railroad Company, a corporation organized under the laws of New York, having its principal office at New York City, New York; that The Delaware and Hudson Canal Company is a corporation organized under the laws of New York, having its principal office at New York City, New York; That the Fitchburg Railroad Company is a corporation organized under the laws of Massachusetts, having its principal office at Boston, Massachusetts; that The Boston and Maine Railroad Company is a corporation organized under the laws of Massachusetts, having its principal office at Boston, Massachusetts; that The Lehigh Valley Railroad Company is a corporation organized under the laws of Pennsylvania, having its principal office at Philadelphia, Pennsylvania; that The Pennsylvania Railroad Company is a corporation organized under the laws of Pennsylvania, having its principal office at Philadelphia, Pennsylvania, and that each of the said above described corporations and persons was, on the third day of September, 1888, or has
308 since become, a common carrier engaged in the transportation of passengers and property, wholly by railroad, alone or together with some one or more of the said other defendants, between points in different States of the United States, and particularly from Titusville, Pennsylvania and Oil City, Pennsylvania, and points in the vicinity of Titusville and Oil City, aforesaid, to Boston, in the State of Massachusetts, and other points in the State of Massachusetts, Connecticut, Rhode Island, Vermont, New Hampshire and Maine, and to New York City, New York, Perth Amboy, Hoboken,

Jersey City, Communipaw, New Jersey, and other points on or near New York harbor, and known as New York harbor points, according as their several lines or routes may run, and that as such common carriers, and in respect to such transportation, they, the said defendants have been and are subject to the provisions of the said "Act to regulate commerce and the acts amendatory thereof and supplementary thereto."

Sixteenth. The learned Court erred in admitting in evidence, against the objection of the defendants, Paragraph 2 of the Plaintiff's Petition, which paragraph is as follows:

"That under and in pursuance of Section 13 of said Act to regulate commerce the Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, did jointly, on the fourth day of December, 1888, apply by petition to the Interstate Commerce Commission, a tribunal which was created and established and now exists under and by authority of an Act of Congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, as amended by Acts approved March 2, 1889, and February 10, 1891, and February 11, 1893, complaining therein to said Interstate Commerce Commission against the Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company, the Delaware and Hudson Canal Company, the Fitchburg Railroad Com-
309 pany, and the Boston and Maine Railroad Company, of certain alleged violations by said defendants of provisions of said Act to regulate commerce, as fully and specifically appears in and by a copy of said petition, marked 'Exhibit A,' and hereto annexed, and the same is hereby made a part of this petition; that under and in pursuance of Section 13 of said Act to regulate commerce, the said Independent Refiners' Associations did jointly, on the same day, to-wit, the 4th day of December, 1888, apply by petition to the said Interstate Commerce Commission complaining therein against the Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company, and the Lehigh Valley Railroad Company of certain alleged violations by said defendants of provisions of said Act to regulate commerce, as fully and specifically appears in and by a copy of said petition, marked 'Exhibit B,' and hereto annexed, and the same is hereby made a part of this petition; that thereafterwards, to-wit, on the thirteenth day of January, 1889, the said Independent Refiners' Association did under Section 13 of said Act to regulate commerce, jointly apply by petition to the said Interstate Commerce Commission, complaining therein against the Pennsylvania Railroad Company and the Western New York and Pennsylvania Railroad Company of certain alleged violations by said defendants, of provisions of said Act to regulate commerce as fully and specifically appears in and by a copy of said petition, marked 'Exhibit C,' and hereto annexed, and the same is hereby made a part of this petition."

Seventeenth. The learned Court erred in admitting in evidence against the objection of the defendants, paragraph 3 of the plaintiffs' petition, which paragraph is as follows,—

"That thereupon and forthwith after the filing of said petitions the said Interstate Commerce Commission did, as required by
310 Section 13 of said Act to regulate commerce, forward to each of the defendants named in said petition, marked "Exhibit A" hereto, a statement of the charges therein set forth, together with a notice to satisfy the complaint or to answer the same in writing within twenty days, and to each of the defendants named in said petition, marked "Exhibit B" hereto a statement of the charges therein set forth, together with a notice to satisfy the complaint or to answer the same in writing within twenty days, and to each of the defendants named in said petition, marked 'Exhibit C' hereto, a statement of the charges therein set forth, together with a notice to satisfy the complaint or to answer the same in writing within twenty days; that thereafterwards answers to each of said petitions were severally filed with said Commission by the defendants therein named denying the alleged violations of said Act to regulate commerce; as set forth in said petitions, respectively 'Exhibits A, B and C' hereto; that thereafterwards the said causes being at issue on the pleadings and having been heard together by agreement of the parties, and duly submitted for determination by said Commission on the *the* testimony and other evidence duly taken, presented or filed in behalf of the respective parties, and the same having been investigated and duly considered by said Commission, it was made to appear to the satisfaction of said Commission that said defendants had violated provisions of said Act to regulate commerce in certain respects as alleged in said petitions, Exhibits A, B and C hereto, and according- on the 14th day of November, 1892, the said Commission so adjudged and made a report in writing in respect thereto, setting forth therein the conclusions arrived at by the Commission in said causes and the findings of fact upon which said conclusions were based. A copy of said report, marked Exhibit D, is hereto annexed and hereby made a part of this petition."

311 Eighteenth. The learned Court erred in admitting evidence against the objection of the defendants, Paragraph 4 of the Plaintiff's Petition, which paragraph is as follows:

"That on the day of the making of the report referred to in paragraph 3 hereof, to wit, the fourteenth day of November, 1892, the said Commission made and entered an order or notice to The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie & Western Railroad Company, The Delaware & Hudson Canal Company, The Fitchburg Railroad Company, The Boston and Maine Railroad Company, The Lehigh Valley Railroad Company, and the Pennsylvania Railroad Company, requiring defendants, among other things, to 'wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points or to Boston and Boston points, or on reasonable notice promptly to furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston

points as said shippers may direct, and that on or before the ninth day of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges, pursuant to the provisions of Section 6 of the Act to regulate commerce, and also file copies of said tariffs with this Commission, as required by the provisions of said section;' and it was further directed and required in and by said order or notice that the rate on shipments of oil, both in tanks and in barrels, over the roads of said defendants should be the same, and that said defendants should 'refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package
312 on shipments of oil in barrels when the use of tank cars has not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use, and, inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary;' all of which appears in and by said order or notice, a full copy of which, marked Exhibit E, is hereto annexed and is hereby made a part hereof."

Nineteen. The learned Court erred in admitting in evidence against the objection of the defendants, Paragraph 7 of the Plaintiff's Petition, which paragraph is as follows:

"That in consequence of the failure and neglect of the respondents and of the other defendants in said causes and of said receivers of The Western New York and Pennsylvania Railroad Company and The New York, Lake Erie and Western Railroad Company to obey and conform to the above mentioned requirements of said order or notice, Exhibit "E" hereto, certain shippers of petroleum oil over the lines operated by parties defendant herein did, at various dates subsequent to the issuance of said order or notice and pursuant to the clause in said order or notice continuing said causes or proceedings for such further action or inquiry by said Commission in regard to the amount of reparation due to injured parties as might become necessary, file with said Commission various claims for reparation under said order or notice, Exhibit "E" hereto, and thereupon the said Commission did, on the tenth day of April, 1894, prepare a notice embodying the said claims for reparation then on file and stating therein that each of the hereinbefore mentioned causes were assigned for hearing before the said Commission at Titusville, Pa., on the fifteenth day of May, 1894, at 10 o'clock A. M. of that day, for the purpose of determining what reparation is due or
313 may be due from the defendants or any of them to the claimants in said notice mentioned or other parties entitled thereto under said order of the Commission of November 14, 1892, "Exhibit E" hereto; and thereafterwards, to wit, on the fourteenth day of April, 1894, the said Commission duly caused a copy of said notice to be delivered to each of the defendants in said causes and to S. G. De Coursey, receiver of The Western New York and Pennsylvania

Railroad Company, who had been appointed as such receiver on or about the first day of April, 1893, and to John King and J. G. McCullough, receivers of The New York, Lake Erie & Western Railroad Company, who had been appointed as such receivers on or about the twenty-fifth day of July, 1893, and which said John King was succeeded as such receiver or co-receiver by the defendant, E. B. Thomas, on or about the first day of May, 1895; and, by order entered by said Commission on the tenth day of April, 1894, and duly caused to be delivered to the parties on April 14, 1894. That on said fifteenth day of May, 1894, the defendants in said causes and the defendants, the receivers of The Western New York & Pennsylvania Railroad Company and The New York, Lake Erie & Western Railroad Company, did appear before the said Commission at Titusville aforesaid, and the said matter of reparation duly proceeded to hearing and investigation, and further or supplementary hearing was also had as allowed by the said order of April 10, 1894, last above mentioned."

Twentieth. The learned Court erred in admitting in evidence against the objection of the defendants, paragraph 8 of plaintiffs' petition, which paragraph is as follows:

"That thereafterwards, to-wit, on the twenty-second day of October, 1895, and after full investigation of the matters involved, and said Commission did make and file further or supplementary report and opinion and orders in said causes, a copy whereof marked "Exhibit H," is hereto annexed and is hereby made a part of
314 this petition; that in and by said further or supplementary report and opinion and orders it was found, decided, required and ordered that certain parties, claimants therein named, members of the complaining associations in said causes, to-wit, Penn Refining Company, Limited, Oil City, Pa.; John Schwartz & Co., Titusville, Pa.; Rice & Robinson, Titusville, Pa.; Rice, Robinson & Foggan, Titusville, Pa.; Independent Refining Co., Limited, Oil City, Pa.; Genie Wood, doing business under the trade name of The Oil Creek Refining Works, Titusville, Pa.; American Oil Works, Limited, Titusville, Pa.; Western Refining Company, Limited, Titusville, Pa.; S. Y. Ramage, doing business under the trade name of The Mutual Oil Company, Reno, Pa.; National Oil Company, Limited, Titusville, Pa.; Continental Refining Company, Limited, Oil City, Pa.; International Oil Works, Limited, Titusville, Pa.; and A. L. Confer, doing business under the trade name of The Empire Oil Works, Reno, Pa., were entitled to recover from and should be paid by the defendants, the Western New York & Pennsylvania Railroad Company; S. G. De Coursey, Receiver of the Western New York & Pennsylvania Railroad Company; the New York, Lake Erie & Western Railroad Company; J. G. McCullough and E. B. Thomas, Receivers of the New York, Lake Erie & Western Railroad Company; the Delaware & Hudson Canal Company; the Fitchburg Railroad Company; the Boston & Maine Railroad Company, and the Lehigh Valley Railroad Company various specified sums as reparation for damages resulting to said claimants from excessive and unlawful transportation charges exacted upon shipments of petroleum

oil in barrels between stated points during a period of time mentioned, and the amount or amounts due to each claimant, the particular defendants who should pay the said amount or amounts so found due, and the reasons why the said defendants should make such reparation to said claimants, including the violations found and set forth in "Exhibit D" hereto, and the continuance of
315 such violations, and the disobedience of said order or notice of November 14, 1892, "Exhibit E," hereto, and in said reports and opinions and orders, "Exhibit H," hereto fully set forth; the said Commission did, on the 11th day *day* of November, 1895, cause a copy of said reports and opinions and orders to be delivered to each of said defendants and claimants and to each and all of the parties to said causes."

Twenty-first. The learned Court erred in admitting in evidence against the objection of the defendants, paragraph 10 of the plaintiffs' petition in this case, which paragraph is as follows:

"That the defendants, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Western New York & Pennsylvania Railroad Company, and the Lehigh Valley Railroad Company have failed, neglected and refused, and still continue to neglect and refuse to make to your petitioner reparation as required by said order and notice, "Exhibit E," and as shown by said report, opinion and order, "Exhibit H," to wit, the sum $8,579.00, with interest thereon from May 15, 1894, being the amount claimed by plaintiff from defendants in this action."

Twenty-second. The learned Court erred in admitting in evidence against the objection of the defendant, the following portion of the findings of facts by the Interstate Commerce Commission, viz:

"After full investigation and mature consideration, our conclusion in reference to the charge for the barrel package is in line with that in the case of Rice, Robinson & Witherop, and with the principles pertinent to the question laid down in that case and in the case of Rice and Schofield, and we hold, that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in
316 barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shippers in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers."

Which offer was objected to by counsel for defendants as not containing a finding of fact, but involving a conclusion of law reached by the Commission as to the effect of existing rates on barrel shippers, the answer of the Court to the said objection being as follows:

"Referring to the 19th offer by the plaintiff of findings of fact from the report of the Interstate Commerce Commission, with the exception of the four lines which refer to the case of Rice, Robinson and Witherop, we think the paragraph constitutes a finding of fact, and the objections are thereby overruled, and an exception noted to the defendants."

Twenty-third. The learned Court erred in refusing the motion made by counsel for the Lehigh Valley Railroad Company to strike from the evidence all findings of fact from Number Four to Nineteen inclusive, of the Interstate Commerce Commission, (and which are set out in the foregoing Assignments of Error), because they all relate to the question of the lawfulness and reasonableness of the charge for the carriage of the barrel package, because of the fact that no charge was made for the weight of the tank in tank shipments, and which are therefore findings of fact as to an issue not raised in the proceedings before the Interstate Commerce
317 Commission in the case as to which the Lehigh Valley Railroad was a party, and are not, therefore, evidence against it.

Twenty-fourth. The learned Court erred in admitting in evidence against the objection of the defendant, the following portion of the finding of the Interstate Commerce Commission, viz:

"It is further ordered, that the defendants' cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their roads or lines from the oil regions of Western Pennsylvania to New York and New York Harbor points or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants, and others who may apply therefor, for the purpose of loading and shipping oil therein to such New York harbor and Boston points as the shipper may direct; and that said defendants notify the public accordingly by publication in their tariff or rates and charges, pursuant to the provisions of sections 6 of the Act to Regulate Commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section. It is further ordered that the rate on shipments of oil both in tanks and in barrels over said roads shall be the same and said rate from said oil regions to New York points shall not exceed 16½ cents per hundred pounds, and to Boston and Boston points shall not exceed 23½ cents per hundred pounds; and the defendants are required to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package on shipments of oil in barrels, when the use of the tank cars has not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use."

Objected to by the defendant as not being a finding of fact;
318 the order of the commission is not in evidence in the case, and objected to generally as incompetent and irrelevant.

By the COURT: "The objections are overruled, and this order is admitted in evidence—not as a finding of fact, but as an act of the

commission in compliance with the statutory powers, and as constituting the ground or one of the grounds upon which this statutory remedy is based; the order to have no other effect with the jury than simply to show a basis for this present proceeding by petition."

Twenty-fifth. The learned Court erred in admitting in evidence the order of the Interstate Commerce Commission dated November 14, 1892, being "Exhibit E" of the plaintiff's printed petition and exhibits attached to these assignments, pages 129 to 133.

Objected to by defendants for the reasons stated in their objection to the portion of the order previously read; and for the further reason that the order is a general order made in three cases before the commission, to only one of which the Lehigh Valley Railroad Company, one of the parties to the present proceeding, was a party.

Twenty-sixth. The learned Court erred in admitting in evidence, against the objection of the defendants, the findings of fact of the Interstate Commerce Commission as found in their report and order on the subject of reparation, marked "Exhibit H" in the plaintiff's petition, and set out on page 137 of the plaintiff's petition and exhibits attached to these assignments.

The objection of the defendant was as follows:

"(1) That the offers are not of any separate and distinct findings of fact by the Interstate Commerce Commission.

(2) The offers as made are excerpts from arguments and conclusions of the Interstate Commerce Commission, separated from their context and containing conclusions of law as well as statements of fact and illustrations.

319 (3) The findings of fact are not presented distinctly and as a separate part of the report, as directed by the Act of Congress.

(4) The findings of fact are not evidence against the defendants for the purpose of making out a *prima facie* case, for the reason that defendants are entitled to a trial by jury without prejudice to their case by any former inquiry or hearing whatsoever.

(5) Counsel for defendants object to the admission of the findings of fact in evidence upon the ground that many of the findings offered in evidence relate to matters not applicable to the through line made up of the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad, but had solely to do with questions at issue with other routes, defendants in entirely separate proceedings, but as to which testimony was taken by the Commission as a whole, under an agreement that it should apply only to the lines affected by it.

(6) The offer is further objected to, for the reason that the findings of fact offered in evidence do not include all the findings contained in the Report of the Commission.

(7) The offer is objected to, as generally incompetent and irrelevant.

(8) Counsel for the Western New York & Pennsylvania Railway Company further object to said findings as in any view of the case evidence against them, for the reason that the said Railway Company was not a party to the proceedings before the Interstate Commerce

Commission, and cannot therefore be affected by any finding of fact, statements, or other matter contained in the report.

(9) Counsel for Samuel G. De Coursey, Receiver of the Western New York & Pennsylvania Railroad Company, further specially objects to the said alleged findings of fact being offered in evidence as to any rights of the said Receiver, for the reason that the
320 said Receiver was not a party to the proceedings before the Interstate Commerce Commission in which said findings of fact were made and entered.

(10) And the additional objection, that the Interstate Commerce Commission had no power or authority to make the order of reparation as entered by them and as now offered by the plaintiff.

(11) That the order of recommendation of the Interstate Commerce Commission on the subject of reparation is not evidence against the defendants in this proceeding; and it is generally incompetent and irrelevant."

By the COURT: The objections to the admission of this order as an order are overruled. The order is received in evidence and its effect is restricted simply as showing the basis on which this statutory proceeding by petition is based, and is not to have any binding effect as an order upon the jury; to this extent, and to this extent only, the order is admitted as such in evidence.

As to the findings of fact contained or embraced in the order, *as* are of opinion that the objections thereto should be overruled. We are of opinion that these findings of fact are made *prima facie* evidence under the Act of Congress, and, further, that the question of the Western New York & Pennsylvania Railway Company not being bound by this record has been passed upon by this Court in a former stage of this proceeding in an opinion filed on the — day of ——, and reported in 82 Fed. Rep., 192.

To which ruling of the Court defendants ask for an exception, and the same is noted."

Twenty-seventh. The learned Court erred in admitting in evidence against the objection of the defendants the Order of Reparation made by the Interstate Commerce Commission in favor of the Penn Refining Company and against the Western New York & Pennsylvania Railroad Company, Samuel G. De Coursey, Receiver thereof, and defendant, the Lehigh Valley Railroad Company in the sum of $8,579.00, as reparation for damage resulting from ex-
321 cessive and unlawful transportation charges, which order is printed in the Plaintiff's Petition and Exhibits annexed hereto, at page 158.

Objected to by the defendants as not a finding of fact within the Act of Congress and as generally incompetent and irrelevant. And further objected to as not a findnig of fact, but as a conclusion of the Commission, and not bearing on the matter now in issue to be considered by the jury; and further, that the order itself shows that it was made upon incompetent testimony, the amount due having been arrived at by the Commission, as appears from the order itself, upon figures embraced in a claim filed by the plaintiffs with a statement endorsed thereon by the Western New York & Pennsylvania Ralroad

Company, without any competent evidence having been given to sustain the same, and generally as incompetent and irrelevant.

FRANCIS J. GOWEN,
Att'y for Lehigh Valley R. R. Co.

Assignments of Error.

And now, to wit, March 2, 1903, came the defendants, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Western New York & Pennsylvania Railway Company, defendants above named, and file the following assignments of error to the record in the above entitled case:

First. The Court erred in admitting the following offer of counsel for plaintiff from the report of the finding of the Interstate Commerce Commission, being paragraph beginning at the bottom of page 90 in the printed report of said commission and extending down to the middle of page 91, said paragraph being as follows:

"After full investigation and mature consideration, we hold that where both modes of transportation are employed by the carrier, and the use of one, the tank car, is not open to shippers im-
322 partially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments, in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels, on like quantities of oil between like points of shipment and destination, than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing the discrimination by any of the defendant carriers."

To which counsel for defendants objected as follows:

"Which offer was objected to by counsel for defendants as not containing a finding of fact, but involving a conclusion of law reached by the Commission as to the effect of its existing rates on barrel shippers."

"By the COURT: 'Referring to the 19th offer by the plaintiff of finding of fact from the report of the Interstate Commerce Commission, with the exception of the four lines which refer to the case of Rice, Robinson and Witherop, we think the paragraph constitutes a finding of fact, and the objections are, therefore overruled, and exceptions noted for the defendants."

Second. The Court erred in admitting the following offer of evidence, under objection of defendant, which said offer, objection of these defendants, and ruling of the Court thereon, are as follows:

"Counsel for plaintiff now offer in evidence the findings of fact of the Interstate Commerce Commission, as found in their report in order, on the subject of reparation, marked Exhibit "H," as referred to in the plaintiff's petition, and as admitted in the answer of the defendants."

"Counsel for Samuel G. De Coursey, Receiver of the Western New York and Pennsylvania Railroad Company, further specially objects to the said alleged findings of fact being offered in
323 evidence, as to any rights of the said Receiver for the reason that the said receiver was not a party to the proceedings before the Interstate Commerce Commission in which the finding- of fact were made and entered."

"By the COURT: 'The objection- to the admission of this order as an order are overruled. The order is received in evidence, and its effect is restricted simply as showing the basis on which the statutory proceeding by petition is based, and is not to have any binding effect as an order upon the jury; to this extent, and to this extent only, the order is admitted as such in evidence. As to the findings of fact contained or embraced in the order, we are of opinion that the objections thereto should be overruled. We are of opinion that these findings of fact are made *prima facie* evidence under the Act of Congress, and, further, that the question of the Western New York & Pennsylvania Railway Company not being bound by this record has been passed upon by this Court in a former stage of this proceeding in an opinion filed on the — day of ——, and reported in 82 Fed. Rep. 192.' "

"To which ruling of the Court defendants ask for an exception, and the same is noted."

Third. The Court erred as follows, in its general charge to the jury:

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs, and justly, fairly and impartially determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established by these two companies (if you find that to be the fact), did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. If you so find, you will also determine to what extent was the rate undue and unreasonable, and whatever amount you so find under the evidence, you would be justified in
324 allowing this plaintiff to recoup or recover upon any shipments it made, and on which it has paid the undue and unreasonable amount."

Fourth. The Court erred in charging the jury as follows, in the general charge:

"In regard to the defendants, Samuel G. De Coursey, receiver, and the Western New York & Pennsylvania Railway Company, it appears that the original company (that is, the Western New York & Pennsylvania Railroad Company), against which this petition was originally filed on December 4, 1888, went into the hands of Samuel G. De Coursey, as receiver, on April 1, 1893. Prior thereto, to wit, on the 14th day of November, 1892, an order was made by the Interstate Commerce Commission against the Western New York & Pennsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation.

"It is alleged (and upon this point we express no opinion, for you

will notice that we leave some facts to be found by you) that thereafter, to wit, on the twenty-second day of October, 1895, an order was made against the receiver, Samuel G. De Coursey, among others, directing him, as receiver of the road, and the Western New York & Pennsylvania Railroad Company to make reparation to the plaintiff of a specific amount, which has been read in evidence before you.

"It is alleged that during this proceeding to thus ascertain the amount of reparation to be made, the receiver was represented by counsel and took part in those proceedings and resisted the entry of the making of such an order. It is also alleged that he was notified of this order of reparation and declined to comply with the same.

"If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against the Western New York and Pennsylvania Railroad Company, the original company, in other respects, and that the said railroad company
325 united, as explained above, in making a through joint rate with the New York, Lake Erie and Western Railroad Company and the Delaware and Hudson Canal Company, and in so doing subjected refined oil in barrels to an undue and unreasonable prejudice or disadvantage, and that when the company ceased to operate its road and it passed into the hands of a Receiver, such Receiver continued to maintain such rate and declined to obey the desisting and reparation orders, and continued the litigation, then we are of opinion that by such acts and the adoption of the rate, the Receiver, as Receiver, had so acted that he should not be exempt from the verdict that this jury might find, if in other respects this plaintiff is entitled to recover a verdict. And as, under the decree of this Court, under which this road was sold to the Western New *New* York and Pennsylvania Railway Company, the said company was made liable for liabilities incurred by the said Receiver, we instruct you that if the plaintiff is entitled, under the foregoing instructions, to a verdict against the Receiver, the jury should be warranted in also rendering a verdict against the Western New York and Pennsylvania Railway Company."

Fifth. The Court erred in its following answer to *to* the point presented by the defendants, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the Receiver thereof,—"That, under all the evidence, the verdict of the jury should be for the defendants, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver thereof."

(Answer.) "Inasmuch as each and every one of the points presented by the several defendants asks us, in each case, to give binding instructions to the jury to find a verdict for the several defendants, we decline to give such peremptory instructions, and the points are, therefore, severally refused, and exceptions noted for the several defendants presenting the same."

326 Sixth. The Court erred in its answer to the following point presented by the defendants, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the receiver thereof: "That under all the evidence the verdict of

the jury should be for the defendant, the Western New York and Pennsylvania Railway Company."

(Answer.) "Inasmuch as each and every one of the points presented by the several defendants asks us, in each case, to give binding instructions to the jury to find a verdict for the several defendants, we decline to give such peremptory instructions, and the points are, therefore, severally refused, and exceptions noted for the several defendants presenting the same."

Seventh. The Court erred in its answer to the point presented by the defendant, Samuel G. De Coursey, receiver, which said point and answer are as foll-ws:

"That under all the evidence the verdict of the jury should be for the defendant, Samuel G. De Coursey, receiver for the Western New York and Pennsylvania Railroad Company."

(Answer.) "Inasmuch as each and every one of the points presented by the several defendants asks us, in each case, to give binding instruction to the jury to find a verdict for the several defendants, we decline to give such peremptory instructions, and the points are, therefore, severally refused, and exceptions noted for the several defendants presenting the same.

PATTERSON, STERRETT & ACHESON,
Attorneys for Plaintiffs in Error Within Named.

327 *Assignment of Errors on Behalf of the New York, Lake Erie and Western Railroad Co.*

Comes now the defendant, the New York, Lake Erie & Western Railroad Company, by Stetson, Jennings & Russell, their attorneys, and files the following assignment of errors in this Court:

First. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of the third paragraph of the plaintiff's petition in this action, and in admitting the said paragraph in evidence.

Second. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of the fourth paragraph of the plaintiff's petition in this action and of the orders of the Interstate Commerce Commission of the 14th day of November, 1892, referred to in said paragraph and in "Exhibit E" attached to the plaintiff's petition, and in admitting the said paragraph and orders in evidence.

Third. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of paragraph Six of plaintiff's petition in this action, and in admitting the said paragraph in evidence.

Fourth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of paragraph Seven of plaintiff's petition in this action, and in admitting the said paragraph in evidence.

Fifth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence

of paragraph Eight of plaintiff's petition in this action, and in admitting said paragraph in evidence.

328 Sixth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of paragraph Tenth of the plaintiff's petition, and in admitting the same in evidence.

Seventh. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of the findings of fact contained in the report of the Interstate Commerce Commission as shown by "Exhibit D" annexed to plaintiff's petition in this action, and to the admission of each and every part of said report as offered by counsel for the plaintiff and in admitting in evidence the said report and the various parts thereof.

Eighth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of the paragraph beginning at the bottom of page 90 and extending down to the middle of page 91 of the findings of fact contained in the report of the Interstate Commerce Commission, being "Exhibit D" attached to the petition herein, beginning with the words "After full investigation and mature consideration, our conclusion," etc., and in admitting the said paragraph in evidence.

Ninth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of the paragraph on page 158 of the said report of the said Interstate Commerce Commission, "Exhibit H," annexed to the petition herein, beginning with the words "in accordance with the above stated rulings and principles we make the following findings and orders," etc., and in admitting said paragraph in evidence.

Tenth. That the Court erred in denying the motion of counsel for the defendant, plaintiffs in error, to strike out the findings of fact and orders of the Interstate Commerce Commission, being "Exhibits D, E, and H" annexed to the petition herein.

329 Eleventh. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of the order made by the Interstate Commerce Commission, and found on pages 122 and 123 of the plaintiff's petition in this action, and in admitting the said order in evidence.

Twelfth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of the order of the Interstate Commerce Commission, dated November 14, 1892, as found in "Exhibit E" of the report of said Commission and as found at pages 129 to 133 of the plaintiff's petition in this action, and in admitting the said order in evidence.

Thirteenth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission of the findings of fact of the Interstate Commerce Commission, as found in the report of the said Commission marked "Exhibit H,"

and as found on pages 137 to 238 of the petition of the plaintiff in this action, and to each and every part thereof, as offered by the counsel for the plaintiff, and in admitting the said findings of fact and the various portions thereof in evidence.

Fourteenth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of copy of the minutes of the Interstate Commerce Commission of their meeting held at Titusville, Pennsylvania, on the 15th day of May, 1894, and to the admission of the said minutes in evidence.

Fifteenth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of pages 378 to 380, inclusive, of the Interstate Commerce Report No. 6, and to the admission of the said pages of the said report in evidence.

Sixteenth. That the Court erred in overruling the objection of the counsel for this defendant, plaintiff in error, to the admission in evidence of the letter sent June 11, 1895, by the Secretary of the Interstate Commerce Commission to H. Schoonmaker, Esq., and in admitting the said letter in evidence.

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Seventeenth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission of a letter dated November 11, 1895, to J. G. McCullough and E. B. Thomas, receivers of the New York, Lake Erie and Western Railroad Company, and in admitting the said letter in evidence.

Eighteenth. That the Court erred in overruling the objection of counsel for this defendant, plaintiff in error, to the admission in evidence of a letter from Martin S. Decker, assistant secretary to Hon. S. S. Mehard, Frick Building, Pittsburgh, Pennsylvania, dated Washington, May 24, '02, and admitting the said letter in evidence.

Nineteenth. That the Court erred in giving the following instruction during the course of the charge to the jury:

"About September, 1888, it is alleged that these railroads established a joint tariff of rate for barrel shipments of oil, at the rate of sixty-six cents, and it is alleged that this rate comprised a charge of fourteen cents for the weight of the barrel or package in which the oil was contained. It is contended that the effect of this rate (and upon that point we express no opinion; that is a fact for you to ascertain)—was to charge fourteen cents for the barrel containing the oil."

Twentieth. That the Court erred in giving the following instruction during the course of the charge to the jury:

"The Commission accordingly, by an order dated November 14, 1892, directed the Western New York & Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company to desist from charging for the transportation of barrel packages, or to furnish tank cars on request for shipments and that these companies make reparation for the freight paid on barrels where the use of tank cars has not been open to shippers impartially."

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Twenty-first. That the Court erred in giving the following instruction during the course of the charge to the jury.

"And as far as respects the present company, their finding was as follows:

"The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof, and the defendant, The New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the Receivers thereof, and the defendant, The Delaware and Hudson Canal Company, the sum of Three Hundred and Forty-three Dollars and fifty-eight cents ($343.58) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said Receiver for transportation over the Western New York and Pennsylvania Railroad, the New York, Lake Erie and Western Railroad, the Delaware & Hudson Canal Co.'s Railroad, and the Central Railroad of New Jersey, from Oil City, Pa., to Newark, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3d day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company, and its said Receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof, and the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the Re-
332 ceivers thereof, and the Delaware and Hudson Canal Company are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of Three Hundred and Forty-three Dollars and Fifty-eight cents ($343.58), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894."

Twenty-second. That the Court erred in giving the following instruction during the course of the charge to the jury:

"These orders the three companies involved in this suit, after notice given to them and their respective receivers did not comply with."

Twenty-third. That the Court erred in giving the following instruction during the course of the charge to the jury:

"The questions you are to ascertain are to be passed upon by you, under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this Interstate Commerce Commission."

Twenty-fourth. That the Court erred in giving the following instruction during the course of the charge to the jury:

"We have allowed findings of fact by the Commission; wherever they have found facts, we have allowed those facts to be given in evidence before you; and those findings of fact are to be considered by you. They are *prima facie* evidence of the matters therein stated, for the Act of Congress provides that 'at the trial the findings of fact of said Commission shall be *prima facie* evidence of the mat-
333 ters therein stated.' By this term *'prima facie'* is meant, gentlemen, that you are to accept such findings of fact as evidence of the matters therein stated, in the absence of proof to the contrary. I trust I have made the distinction quite clear to you: That so far as the findings of fact by this Commission are concerned, they are *prima facie* evidence of the matters therein stated, and they are to be considered by you in making up your verdict."

Twenty-fifth. That the Court erred in giving the following instruction during the course of the charge to the jury:

"The first question to which you will turn your attention is whether a joint through rate was established and adopted by the Western New York & Pennsylvania Railroad Company, the New York, Lake Erie & Western Railroad Company and the Delaware & Hudson Canal Company, as alleged about 1888, for the carrying of refined oil in barrels from Titusville and Oil City, in the State of Pennsylvania, to Newark, in the State of New Jersey. The establishment and adoption of such joint through rate between the points in these two States by these railroads is a primary fact *of* indispensable and necessary to be found in order that the plaintiff shall recover in this case, and unless you find that such joint through rate was established by all three of these roads—such interstate rate—the plaintiff cannot recover, and your verdict should be for the defendants."

Twenty-sixth. That the Court erred in giving the following instruction during the course of the charge to the jury:

"As there is nothing in the Act which defines what undue or unreasonable prejudice or disadvantage is, or what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law but of fact. There are therefore submitted to you, gentlemen, as a jury to determine."

334 Twenty-seventh. That the Court erred in giving the following instruction during the course of the charge to the jury:

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs, and justly, fairly and impartially to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Newark, so established by these three companies (if you find that to be the fact), did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"If you so find, you will also determine to what extent was the rate undue and unreasonable, and whatever amount you so find

under the evidence, you would be justified in allowing this plaintiff to recou or recover upon any shipments it made and on which it has paid the undue and unreasonable amount."

Twenty-eighth. That the Court erred in refusing to give to the jury the following instruction requested by this defendant, plaintiff in error:

"That under all the evidence in the above entitled case their verdict should be for the defendant, New York, Lake Erie & Western Railroad Company.

Twenty-ninth. That the Court erred in denying the motion made by counsel for this defendant, plaintiff in error, to set aside the verdict and grant a new trial.

Wherefore, this defendant, plaintiff in error, prays that the judgment entered in this cause in the Office of the Clerk of the United States Circuit Court for the Western District of Pennsylvania on the — day of February, 1903, be reversed, and that the said Cir-
335 cuit Court be directed to grant a new trial of said cause, and for such other and further relief as may be proper.

Dated February 28th, 1903.

STETSON, JENNINGS & RUSSELL,
Attorneys for New York, Lake Erie & Western Railroad Company, Plaintiff in Error, one of the defendants in the Lower Court, 15 Broad Street, Borough of Manhattan, City of New York.

Bill of Exceptions.

Be it Remembered, That in the same term came the said Plaintiff unto the said Court and impleaded the said defendants in a certain proceeding by petition under Act of Congress, &c., in which the said Plaintiff declared (prout petition) and the said defendant answered (prout answers). Thereupon issue was joined between them.

And afterwards, to-wit; at a session of said Court held at the District aforesaid before the Honorable Joseph Buffington, Judge of the said Court, the 19th day of May 1902, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly empaneled (prout list of jurors) at which day came as well the said plaintiff as the said defendants by their respective attorneys; and the jurors of the jury aforesaid empaneled to try the said issue being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue and upon the trial the counsel of the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof, and the Western New York and Pennsylvania Railway Company, two of the said defendants, excepted to certain rulings of the said Court, as appears in the following notes of the trial made by the official stenographer of the said court.

336 *Stenographer's Transcript of Notes of Trial.*

Monday, May 19th, 1902, this cause came on for trial at a regular term of the United States Circuit Court, held at Pittsburgh, Pennsylvania, before the Honorable Joseph Buffington, Judge presiding, and a jury.

There appeared for the plaintiff M. J. Heywang, Esq., Hon. Samuel S. Mehard, Hon. J. Wilson Lee, John B. Chapman, Esq., and Eugene F. Mackey, Esq.

There appeared for the defendants Thomas Patterson, Esq., of Messrs. Patterson & Sterrett (for the Western New York & Pennsylvania Railway Company), Frank Rumsey, Esq., (for the Western New York & Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver), Francis I. Gowan, Esq. (for the Lehigh Valley Railroad Company) and F. B. Jennings, Esq., of Messrs. Stetson, Jennings & Russell.

Jury called and sworn at 4:10 o'clock P. M.

Court adjourned to 9:30 o'clock A. M., Tuesday, May 20th, 1902, and called pursuant thereto.

Plaintiff opens by Mr. Heywang.

Plaintiff offers in evidence those parts of the plaintiff's petition filed in this case which have not been denied by the defendants' answer, being—

First. Paragraph 1 of the plaintiff's petition (found on pages 2, 3 and 4 of petition. (Part of paragraph read.)

Defendants' counsel object to the reading of paragraph 1 and to its incorporation in the record for the reason that the pleadings and averments in the petition are not evidence.

Counsel for plaintiff state they are offering paragraph 1 as an admission of fact.

Defendants' counsel state they have no objection to an admission of the fact that they are railroad companies.

Substance of Paragraph 1 stated by plaintiff's counsel to the Court.

337 Plaintiff likewise offers Paragraph 11 of Plaintiff's Petition.

Plaintiff likewise offers Paragraph 111 of Plaintiff's Petition.

(Objected to by defendants' counsel as setting forth the finding of the Commission, which is not evidence under the Act of Congress. Further, this being an appeal from the finding of another tribunal, what that finding was is not evidence where that appeal is taken.)

Counsel for plaintiff state they are offering in evidence the admission of the fact that there were proceedings before the Interstate Commission, and that there were findings of fact there.

Counsel for defendants state they do not admit there were any findings of fact, but they have no objection to plaintiff's counsel stating there were proceedings before the Interstate Commerce Commission, which were terminated, and that this appeal was taken; they will admit there was an order made by the Commission, but do not admit there were any findings of fact.

Plaintiff's counsel state Paragraph 111 of the Plaintiff's Petition is offered in evidence, under the admissions of the Answer, for the purpose of showing that the proceedings therein referred to were had before the Commission, and that the order therein referred to and the findings of fact therein referred to were made by the Commission.

(Objected to by defendants' counsel for the reason that the averments of the petition are not, under the Act of Congress, or under any rule of court, evidence of any matters therein set forth, whether denied or not; the admissions of the Answer are evidence, but should be made in the terms in which those admissions are contained in the answers of the respective defendants.)

Defendants' counsel again state they will admit there were
338 proceedings before the Interstate Commerce Commission, and that they terminated, but they do not admit there were findings of fact.

Plaintiff's counsel state they do not wish to be understood as saying that they are offering this for the purpose of showing that the defendants admit the findings of fact, but they are offering it for the purpose of showing that the document identified as "Exhibit D" was the true document filed by the Interstate Commerce Commission.

By the COURT: The Court admits the averments in evidence for the purpose of showing that such proceedings were had and such orders made. As to the question whether such orders were lawful orders or requirements, which the defendants were required or bound to obey, the Court concedes that is not a question now before it, and upon that it expresses no opinion and makes no ruling.

Counsel for defendants request the Court to note an exception to the admission of the paragraphs of the plaintiff's petition *in hoc verba*, as counsel for plaintiff is reading them to the jury.

Counsel for defendants again state they have no objection to admitting the fact that there were these proceedings before the Interstate Commerce Commission, that those proceedings terminated, and that certain reports were made against the defendants, but they do object to the report that is made here before the jury.

By the COURT: We will note the exception requested.

Plaintiff offers paragraph IV of plaintiff's petition (pages 7 and 8 of the petition).

Offered for the purpose of showing the orders which were made by the Interstate Commerce Commission on the 14th day of November, 1892, as shown by "Exhibit E," attached to the petition.

Objected to by defendants' counsel, for the reason that the order of the Interstate Commerce Commission, as set forth in "Exhibit E," is not evidence, under the Act of Congress, against these defendants.

339 Counsel for defendants are willing to admit that an order was made by the Interstate Commerce Commission which the defendants refused to comply with, but object to the terms of the order being now offered.

The Court inquires the legal purpose of the offer.

Counsel for plaintiff state the legal purpose of the offer is to show the violation of the order, the failure of the company; it is followed

by a complaint that the company failed to comply with the order and make the reparation which was required therein.

By the COURT: Paragraph IV of the answer admitting the proceedings recited in this act were had and the orders were made, the paragraph offered in evidence is admitted to prove such facts, but the questions as to the legal effect of such orders and the validity of the same are not now passed on and are not involved in this answer.

At the request of counsel, an exception is noted for the defendants to the preceding ruling by the Court.

Plaintiff likewise offers the averments of paragraph V of plaintiff's petition, which are also not denied by the answers of defendants.

Offered for the purpose of showing notice to the defendants of the orders referred to in "Exhibits D and E."

Plaintiff likewise offers the averments of paragraph VI of plaintiff's petition, which are not denied by the defendants' answers.

Offered for the purpose of showing the failure on the part of the defendants to comply with the orders referred to and embraced in "Exhibit E."

Objected to by counsel for defendants as before—as not evidence under the Act of Congress.

By the COURT: Those are admitted in evidence simply for the purpose of showing non-compliance.

Plaintiff also offers averments of paragraph VII in plaintiff's petition. (Pages 9, 10 and 11.)

340 Offered for the purpose of showing the proceedings before the Interstate Commerce Commission subsequent to November 14, 1892, to wit, the proceedings resulting in the assessment of damages in favor of the paintiff in this suit and others and against the defendants, leading up to the hearing before the Commission on the 15th day of May, 1895; and for the further purpose of showing that S. G. De Coursey was then the receiver of the Western New York and Pennsylvania Railroad Company, and that he was represented at the hearing of May 15th, 1894.

(Objected to by defendants' counsel for the reason that the averments of the petition are not under the Act of Congress, evidence against the defendants, and further objected to as incompetent and irrelevant.)

By the COURT: We will make the same ruling with reference to this paragraph as in the case of paragraph IV.

At the request of counsel, an exception is noted by the Court for the defendants to the preceding ruling.

Plaintiff likewise offers the averments of paragraph VIII of plaintiff's petition, under the admissions of the answers of the defendants, for the purpose of showing that the plaintiff in this case was a member of the complaining association in the suits pending before the Interstate Commerce Commission; that the said Commission, after hearing of the parties, did assess damages in favor of the plaintiff and against the defendants in this suit, the Western New York and Pennsylvania Railroad Company, Samuel G. De Coursey, receiver thereof, and the Lehigh Valley Railroad Company, by report, findings, opinion and order made on the 22nd day of October, 1895, as shown by

"Exhibit H," attached to the petition and made part thereof, and that notice thereof was served on the said defendants on the 11th day of November, 1895, by the Commission, as set forth in the said paragraph, the notice being by copy of the report, opinion and orders

341 Objected to by counsel for defendants for the reason that the averments of the petition and that the award referred to therein of damages against the defendants are not evidence under the Act of Congress against these defendants, and objected to further as incompetent and irrelevant.

By the COURT: We will make the same ruling as made in the case of paragraph IV.

At the request of counsel an exception to the preceding ruling is noted by the Court to the defendant.

Plaintiff also offers the averments of paragraph X of plaintiff's petition (page 13 of petition).

Offered for the purpose of showing a failure on the part of the defendants, and their refusal to comply with the order of reparation as made by the Interstate Commerce Commission.

Objected to by counsel for defendants for the reason that the averments of the petition are not evidence against the defendants under the Act of Congress or any rule of Court, and further, for the reason that the particular averment is denied by the answer—the defendants deny that they have caused any damage whatever to the plaintiffs, and also objected to as generally incompetent and irrelevant.

By the COURT: In view of the express admission in the answer of the Lehigh Valley Railroad Company, which "admits the averments contained in paragraph X of the petition," and of the answer of the Western New York & Pennsylvania Railway Company, "admitting that proceedings were had and prosecuted and terminated in the manner therein set forth," we overrule the objection and admit the averments in evidence to show that such proceedings took place; the effect and validity of these proceedings as matters of evidence are not now passed upon.

At request of counsel and exception to the preceding ruling is noted by the Court to the defendants.

342 Plaintiff offers paragraph XI of the petition of plaintiff (pages 14 and 15 of petition).

(Plaintiff's counsel states that under the answers of the defendants in this case there is a qualified admission or a qualified denial (whichever they may choose to call it) of the Lehigh Valley Railroad Company of the averments of this paragraph; there is no denial by the other defendants.)

(Objected to by defendants' counsel for the reasons:)

First. The averments of the petition are not, under the Act of Congress, or under any rule of Court, evidence against the defendants in this proceeding.

Second. The offer is incompetent and irrelevant.

Third. The said averment is distinctly and specifically denied in the answer of the Lehigh Valley Railroad Company, defendant.

(Plaintiff's counsel state the 11th paragraph is offered for the

purpose of showing the fact of the through route established by the defendants in this case from the oil regions to the seaboard, and that they demanded and received a gross sum as a joint freight charge for the carrying of the traffic through.)

(Offer withdrawn by counsel for plaintiff.)

(Plaintiff likewise offers the admissions contained in Paragraph VII of the answer of the defendant, the Lehigh Valley Railroad Company, bearing upon the subject of the arrangement between the said company and the Western New York & Pennsylvania Railroad Company for traffic from the oil regions of Pennsylvania to Perth Amboy.)

(Offer made as against the Lehigh Valley Railroad Company, and no objection made.)

(Plaintiff offers in evidence the answer of the other defendants in this case (the Western New York & Pennsylvania Railway Company) so far as that answer relates to Paragraph XI of the Plaintiff's Petition, for the purpose of showing that the same is not denied.)

343 (Objected to by counsel for defendants for the reason that no admission on that subject is contained in the answer of the Western New York & Pennsylvania Railway Company.)

By the COURT: We will overrule the objection and permit the Answer in evidence for the purpose stated.

Plaintiff offers in evidence the Findings of Fact contained in the report of the Interstate Commerce Commission as shown by "Exhibit D," referred to in the Paragraphs of Plaintiff's petition in this case. (Beginning on page 57 of the Plaintiff's petition.) ("Exhibit D" beginning on page 57.)

Counsel for defendants ask plaintiff's counsel specifically to indicate the findings of fact thus offered by them.

As thus requested, plaintiff's counsel specify the following portions of "Exhibit D," while they are proposing to offer. (Found on pages 57 to 125 inclusive of Petition.)

344 Before the Interstate Commerce Commission.

(No. 153.)

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PENNSYLVANIA, and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA,

vs.

THE WESTERN NEW YORK and PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, THE DELAWARE AND HUDSON CANAL COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON AND MAINE RAILROAD COMPANY.

(No. 154.)

SAME

vs.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, and THE LEHIGH VALLEY RAILROAD COMPANY.

(No. 163.)

SAME

vs.

THE PENNSYLVANIA RAILROAD COMPANY and THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

345 Complaints filed in first two cases December 4, 1888, and in third case January 30, 1889. Answers filed December 26, 1888, to February 26, 1889. Heard at Titusville, Pennsylvania, May 15, 1889. Briefs filed February 11, 1890, to September 23, 1891. Decided December 14, 1892.

Page 59 (Report and opinion of the Commission.) "These three cases were heard together and may be disposed of at the same time.

Page 60. "The Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, the complainants in each case, are composed of separate and distinct companies, engaged in the manufacture and sale of refined petroleum and products of petroleum at works owned and operated by them in the oil regions of Pennsylvania at or near said cities of Titusville and Oil City. * * *

Page 73.

"The leading questions raised by the pleadings in these cases relate (1) to the lawfulness of the charge for the barrel package under the circumstances and conditions disclosed by the evidence." * * *

All of page 75 (of petition), beginning with the first paragraph on that page; all of page 76; all of page 77; all of page 78; all of

page 79, and that part of page 80 which ends with the words, in italics, "limited in their use to such owners." (See petition.)

Page 83.

"The tank of the tank car performs the function of a package in tank shipments, as the barrel does in barrel shipments."

And all of page- 84 and 85 down to the end of the second paragraph on that page. (See petition.)

The last paragraph on page 87 of the petition and that part of the following page ending with the words "supply them to the roads."

346 Paragraph at bottom of page 90, beginning with the words "After full investigation and mature consideration," and ending with the words "such discrimination by any of the defendant carriers," about half way down on page 91.

On page 92, the paragraph beginning "The defendants in the case against the Western New York & Pennsylvania R. R. Co.," and ending with the words "at New York harbor points."

On page 93, about two-thirds of the way down that page, beginning with the words "In many instances the same railroad forms a link in several routes," and continuing throughout the rest of that page.

Page 94 of petition, including table on that page, but omitting the table on page 95, as irrelevant to the issue, but beginning with the paragraph half way down that page as to rates prior to those shown in above table, and continuing throughout the rest of that page.

All of page 96 and that part of page 97 beginning with the first words and continuing through to the end of the second paragraph, which ends with the words "per 100 pounds of oil transported."

That part of page 122 beginning with the words "It is further ordered that the defendants cease and desist," and continuing on over to page 123, to the end of the paragraph concluding with the words "deprived of their use."

Also second paragraph on page 123, which is offered only for the purpose of showing the continuance of the proceedings.

And the last sentence on page 125 of Petition.

Counsel for defendants object to the foregoing offers for the reason:

First. That the offers are not of any separate and distinct finding of fact by the Interstate Commerce Commission.

Second. The offers as made are excerpts from arguments
347 and conclusions of the Interstate Commerce Commission separated from their context and containing conclusions of law as well as statements of fact and illustration.

Third. The findings of fact are not presented distinctly and as a separate part of the record as directed by the Act of Congress.

Fourth. The findings of fact are not evidence against the defendants for the purpose of making out a *prima facie* case, for the reason that the defendants are entitled to a trial by jury, without prejudice arising to their case by any former inquiry or hearing whatsoever.

Fifth. Counsel for defendants object also to the admission of find-

ings of fact in evidence upon the ground that many of the findings offered in evidence relate to matters not applicable to the through line made up of the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad, but had solely to do with matters at issue with other routes, defendants in entirely separate proceedings, but as to which the testimony was taken by the Commission as a whole under an agreement that it should apply only to the lines affected by it.

Sixth. Further objected to for the reason that the findings of fact offered in evidence do not include all the finding- contained in the report of the Commission.

Seventh. As generally incompetent and irrelevant.

Eighth. Counsel for the Western New York & Pennsylvania Railway Company further object to said findings as in any view of the case evidence against them, for the reason that the said railway company was not a party to the proceedings before the Interstate Commerce Commission, and therefore cannot be affected by any findings of fact, statements or other matter contained in the report.

Ninth. Counsel for Samuel G. De Coursey, Receiver of the Western New York & Pennsylvania Railroad Company, further specifically objects to the said alleged findings of fact being offered in evidence as to any rights of the said Receiver, for the reason that the
348 said Receiver was not a party to the proceedings before the Interstate Commerce Commission, in which the said findings of fact were made and entered.

Court takes recess at 2 o'clock P. M., same day, and calls pursuant thereto.

By the COURT: The objections made by the several counsel to the general offers of evidence may be reduced, for present purposes, to two heads, namely:

First. Whether the Receiver and the railway company are parties and privies to the original proceedings, so as to be affected by said proceedings in either way.

Secondly. Whether the findings of fact, if properly made and stated by the Commission, are to be received in evidence as making out a *prima facie* case against parties to the said record.

The first question we think is disposed of by the action of this Court passing on the demurrers to which all these present litigants were parties at No. 24 May Term, 1896, on the — day of ——, 190 . And so far as the second question is concerned, we hold for present purposes that the findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated as provided in the 16th Section of the Interstate Commerce law. The objections are, therefore, overruled. These objections are overruled without concluding the Court as to what particular facts in said report come within this ruling, counsel for plaintiff having stated that they would follow this offer by offers of facts proven *seriatim*.

At request of counsel exceptions *of* the preceding ruling are noted by the Court to the several parties defendant.

Plaintiff offers that part of "Exhibit D," being the report of the

Interstate Commerce Commission, wherein the titles to the three cases before the Interstate Commission were stated, and the first sentence of the Commission's Report, wherein it is said:

349 First. "These three cases were heard together, and may be de-posed of at the same time." (Page 59 of Petition.)

Plaintiff offers second paragraph of the report of findings of the Commission, as follows:

Second. "The Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, the complainants in each case are composed of separate and distinct companies engaged in the manufacture and sale of refined petroleum and products of petroleum at works owned and operated by them in the oil regions of Pennsylvania at or near said cites of Titusville and Oil City." (Page 60.)

Third. Plaintiff offers the first paragraph appearing on page 73 of Plaintiff's Petition, as follows:

"The leading questions raised by the pleadings in these cases relates, (1) to the lawfulness of the charge for the barrel package under the circumstances and conditions disclosed by the evidence; (2) to the reasonableness in themselves of the rates in question; and (3) to the relative reasonableness of its rates to Boston and New England points as compared with those to New York and New York harbor points."

Fourth. Plaintiff offers the first paragraph on page 75 of plaintiff's petition, as follows:

"The defendants transport oil in bulk in tank cars and in wooden barrels in box and rack cars. Prior to September 3, 1888, the rates over the lines of the defendants on shipments of oil both in tanks and barrels had been the same for a like quantity of that commodity exclusive of any change for the weight of the barrel in barrel shipments, but about that time, the rates on barrel shipments were increased 14 cents to New York points and more to Boston points, this additional charge being for the weight of the barrel, and as the rates

350 on tank shipments, not including the weight of the tank or package, were not advanced but allowed to remain as they were, the result was a discrimination in favor of the tank as against the barrel shipper. The question is whether that discrimination is in the language of the statute as 'unjust discrimination.'"

Counsel for defendants object to all that part of the paragraph after the words, "this additional charge being for the weight of the barrel, and as the rates on tank shipments," as finding of fact, and to all on page 76 of plaintiff's petition, down to the beginning of the last paragraph, as not a finding of fact, but as a statement.

By the COURT: We will admit down to after the words "barrel shipper."

5th. Plaintiff offers the paragraph immediately following the one last offered, as follows:

"The defendants set up several matters in excuse or justification of their action in this matter. They claimed in the first place that in originally making the additional charge for the barrel package, they did so in compliance with what they conceived to be the ruling of

this Commission in reference thereto in the case of Rice *vs.* Louisville and N. R. Co., 1 Inters. Com. Rep. 722, 1 I. C. C. Rep. 503. This point is fully discussed in the case of Rice, Robinson & Witherop and it is made clear that not only no warrant for the action of the carriers proceeded against in the present cases is found in any ruling of this Commission, but also that said action is in disregard of the "principle plainly and emphatically laid down by the Commission," in said case of Rice and also in the subsequent case of Schofield *vs.* Lake Shore and M. S. R. Co., 2 Inters. Com. Rep. 67, 2 I. C. C. Rep. 90. If it be conceded that in the language used by the Commission in said cases there was some color for the original institution of the discrimination arising from the charge from the weight of the barrel, yet no authority for the continuance of that discrimination can be predicated of such language since the issuance by the Commission and communication to the carriers of the memorandum
351 entitled, "Relative Tank and Barrel Rates on Oil," 2 Inters. Com. Rep. 245, 2 I. C. C. Rep. 365, in which it was declared that the action of the carriers in this particular was unwarranted by the decisions in said cases."

(Objected to by defendants' counsel as not a finding of fact, but a statement, and further that could not be a finding on which an award could pass.

By the COURT: We will rule out the paragraph beginning at the bottom of page 75 of petition, and note an exception to the plaintiff.

6th. Plaintiff offers the paragraph immediately following the one last offered, as follows:

"Having instituted the discrimination in order, as they allege, to bring their practice into conformity with what they understood to be the rulings of this Commission, the carriers now seek to justify and maintain this departure from their former custom of long standing on other grounds." (Page 76.)

(Objected to by defendants' counsel as not a finding of fact, but a statement, and further that could not be a finding on which an award could pass.)

By the COURT: We will also rule out the paragraph offered on page 76 of petition, and note an exception to the plaintiff.

7th. Plaintiff offers last paragraph on page 76 of plaintiff's petition, as follows:

"It is claimed that in case of special facilities at loading and unloading points, the tank cars are handled more rapidly than cars carrying oil in barrels. This may be true, but the testimony is that the railroads do not provide these facilities and there are none at the seaboard of which the complainants can avail themselves. When special facilities for loading and unloading tank cars are not available, greater delay occurs than in loading and unloading barrel cars.'

No objection.

352 8th. Plaintiff offers first paragraph on page 77 of petition, as follows:

"It is further set up by the carriers in justification of the charge by the barrel package, that the barrel belongs to the shipper and

is an article of merchandise, and when shipped from the oil region to the seaboard sells for an advance over cost in the oil region equal to the freight paid on the barrel. They estimate the cost of the barrel in the oil region without manufacturer's profit at from $1.11 to $1.16 and the selling price in New York at from $1.30 to $1.32½ per barrel, which would be a profit somewhat greater than the amount of the freight charge of 14 cents. This estimate, however, only includes the cost of the barrel as received from the barrel maker and ignores the further cost incurred by the refiner in preparing the barrel as a receptacle of oil. After the barrel is received from the manufacturer, the refiner has to paint it on the outside, coat it with glue within, put in a bung hole and provide a bung, plug worm holes, recooper the barrel and see that — is perfectly tight. The proof shows that the cost of the labor and material for this preparation of the barrel is from 16 cents to 17 cents per barrel, and that this added to the original cost as received from the manufacturer makes the total cost per barrel to the refiner from $1.30 to $132½, the selling price in New York."

Judge Mehard continued his offers, as follows:

9th. The next paragraph down to the middle of page 78:

"The total cost of the barrel and its preparation to the refiner at Titusville and Oil City is shown by the following itemized statements, the first being made at Oil City, and the second at Titusville:

353 I.

New Barrels with heavy iron for export	1.16
Labor in coopering, gluing, painting and loading on cars per Barrel	.055
Glue, per bbl	.065
Paint, Rosin, Naphtha, &c., per bbl	.020
Bungs, Stencils, Brushes, Repairs to machinery and buildings, Steam, &c	.025
Total per bbl	$1.325

II.

New Barrels, heavy hoops, average price	1.13
Total labor.....Per bbl	.06
Glue ..... "	.06
Paint, Rosin, Naphtha..... "	.02
Bungs, Rivets, Iron, Plugs.... "	.005
Stencils, Brands, Brushes, Brooms, etc., per bbl	.005
Tools, Utensils, fillers, hose and machinery	.02
Total per barrel	$1.30

10th. The succeeding paragraph on page 78, as follows:

"If sold in New York or paid for as part of the consignment, the barrel does not bring more than its cost to the shipper and when returned empty it is at the shipper's expense. Moreover, as is said—

Mr. Gowan, of counsel for defense, objected to that portion of the paragraph about to be read, as not a finding of fact, and the citation of the authority in said paragraph was omitted and the remainder of said paragraph then offered as follows:

"Moreover, in the carriage of oil the barrel is not shipped as merchandise, but as a package or means of transportation of the oil."

11th. The succeeding paragraph on page 78, as follows:

"It is also maintained that the transportation in tanks yields the carrier a larger revenue above the cost of service than that in
354 barrels. In support of this contention, tables showing dead and paying weight hauled in tank cars carrying oil in bulk and box cars carrying oil in barrels, respectively, were introduced in evidence on the part of the defendants, and it appears therefrom that the amount of paying freight hauled in the average tank car is greater than that in the average car loaded with barrels, and that in consequence the revenue to the carrier is somewhat greater in the former case than in the latter, even when the barrel package is charged for, and is of course still greater where no charge is made for the barrel package. It is estimated by one of the witnesses that at the present rate of 16½ cents per 100 lbs. to New York points, the carrier would receive on an average train load, the barrel package being charged for, $35.76 more for the transportation of oil in tanks than in barrels, and excluding the charge for the barrel package, $237.20 more. Without affirming the strict accuracy of these tables and estimates, it may be conceded the evidence shows the amount of paying freight to be materially greater in tank shipments than in barrel shipments. In the case of Scofield *vs.* Lake Shore & M. S. R. Co., 2 Inters. Com. Rep. 67, 2 I. C. C. Rep. 90, it was found that 'the tank car taking the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with the full load.' "

12th. The succeeding paragraph beginning on page 79, and ending on page 80 with the words, in italics, "limited in their use to such owners."

Objection was made to this offer by counsel for defendants, that part of the statements therein contained are not findings of fact; whereupon counsel for plaintiff limited their offer to the thirteen lines of said paragraph beginning with the words "these circumstances and conditions do not present a case, etc." and ending with the words "limited in their use to such owners," with which understanding they were then permitted to read from the begin-
355 ning of the paragraph referred to, in order that the connection might be understood. The paragraph was then read, as follows:

"This plea that the transportation in tanks is the more profitable to the carrier in yielding a larger revenue above the expense of service was presented in the case of Rice, Robinson & Witherop and was in effect held to be no justification of the discrimination between tank and barrel shippers under the circumstances and conditions regulating the use of the two modes of transportation. These circumstances and conditions do not present a case of t-o modes of transportation open indiscriminately to shippers in general, the one at

a higher rate than the other, and as to which the shipper may take his choice and pay accordingly, but a case where the cheaper rate and, as is claimed by the defendants, the better mode of transportation is available practically to only a particular class of shippers. The railroads do not to any material extent own tank cars or furnish facilities for loading and unloading them, but they are owned almost entirely by the shippers and limited in their use to such owners."

13th. Beginning with the last paragraph on page 83, being the second line from the bottom, and down to the close of that paragraph on page 84, as follows:

"The tank of the tank car performs the function of a package in tank shipments, as the barrel does in barrel shipments. The carrier, in renting and paying mileage for the tank car, furnishes the tank shipper a package and free transportation thereof; the barrel shipper furnishes his own package and is charged for its transportation. At 14 cents a barrel on the minimum carload of 60 barrels, the discrimination against the barrel shipper amounts to $8.40, equivalent to freight at tank rates on over 16 barrels of oil. The average distance from Oil City and Titusville to New York harbor points by the railway lines between those points is over 500 miles. The mileage paid per car for round trip at ¾ cents per mile amounts to over
356 $7.50. The tank shipper, therefore, receives about $7.50 per round trip for the use of his car including a package for his oil, while the barrel shipper pays $8.40 per car for the transportation of his packages one way.

14th. The succeeding paragraph on page 84, as follows:

The cost of the tank car is from $600.00 to $634; it requires special facilities for loading and unloading, has to be cleaned out after use to render it fit for carriages of different qualities of oils, and carries no return loads from the East. Barreled oil is transported in box and rack cars; the box cars generally used for that purpose are old and inferior, unfit for the transportation of merchandise in general, and new box cars are seldom so used, as the leakage and odor of the oil are calculated to render them unsuitable for the carriage of freight liable to be damaged thereby. The box car cost- about $450. It is estimated and the evidence tends to show that from five to ten per cent. of the cars used in carrying oil in barrels return loaded."

Mr. Gowan, on behalf of the defendant, objects to the last sentence in the preceding offer, as not being a finding of fact, which objection was overruled.

15th. The succeeding paragraph, beginning on bottom of page 84, as follows:

"A statement introduced in evidence, dated October 1, 1889, shows that the total tank car equipment of the United States so far then known was 7864 cars, owned and operated as follows:

Owned by railroads		1342
Owned by companies and individuals not connected with the Standard Oil Company (approximately)		1844
Leased by Standard Oil Company to outside parties		300
Total operated by parties not connected with the Standard Oil Company (approximately)		3486
Owned by Standard Oil Company	4497	
357 Less leased to others	300	
Total operated by the Standard Oil Company		4497
Owned in part by Standard Oil Company		181
		4378
Total tank car equipment		7864

16th. The succeeding paragraph as follows:

"From this it will be seen that the Standard Oil Company owns and operates over half of the total tank car equipment of the United States. The complainants manufacture refined petroleum and its products at or near Oil City and Titusville and sell the same in the domestic markets and at the Atlantic seaboard for export. They do this business in competition with the Standard Oil Company, and others. The capacity of the refineries of complainants is about two million barrels per annum, and their actual shipments for the year 1888 were about a million and a half barrels of petroleum products. The shipments were entirely by rail and for the most part in barrels."

17th. The last sentence in the paragraph ending on page 87, beginning with, "The fact that the Standard Oil Company owns and operates more than half of the total tank car equipment of the United States, etc."

This offer was objected to, as not containing a finding of fact. Which objection was sustained, and the sentence offered was not read.

18th. The first two sentences of the following paragraph, beginning at the bottom of page 87, viz:

"In the statement above of the total tank car equipment of the United States, 1,342 is the number given as owned by railroad companies. Of these 1,130 belong to the Pennsylvania Railroad Company, leaving 212 as the number owned by all other railroads in this country. Practically, then with the exception of the Pennsylvania Railroad Company, the defendants carry oil in tank cars for
358 such shippers only as own the cars and supply them to the roads."

19th. The paragraph beginning at the bottom of page 90 and extending down to the middle of page 91, beginning:

"After full investigation and mature consideration, our conclusion, etc."

Which offer is objected to by counsel for defendants, as not con-

taining a finding of fact, but involving a conclusion of law reached by the Commission as to the effect of existing rates on barrel shippers.

In support of the offer counsel for the plaintiffs referred the Court to the opinion of Justice Shiras of the United States Supreme Court in the case of the Texas & Pacific Railway Company *vs.* Interstate Commerce Commission, 162 U. S. Rep. 219.

The Court reserved its decision on this offer until the following morning, and Court adjourned until Wednesday, May 21, 1902, at 9:30 A. M.

And now, to wit, Wednesday, May 21, 1902, the Court called at 9:30 A. M., and the trial of this cause was resumed.

By the COURT: Referring to the 19th offer by the plaintiff of finding of fact from the report of the Interstate Commerce Commission, with the exception of the four lines which refer to the case of Rice, Robinson and Witherop, we think the paragraph constitutes a finding of fact, and the objections are thereby overruled and an exception noted to the defendants.

Counsel for plaintiff thereupon read their 19th offer as follows:

"After full investigation and mature consideration, we hold, that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impar-
359 tially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels or light quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers."

Mr. Gowan, on behalf of the Lehigh Valley Railroad, now moves to strike out of the evidence all findings of fact from No. 4 to No. 19, both inclusive, because they all relate to the question of the lawfulness and reasonableness of the charge for the carriage of the barrel package, because of the fact that no charge was made for the weight of the tank in tank shipments, and which are therefore findings of fact as to an issue not raised in the proceedings before the Interstate Commerce Commission in the case as to which the Lehigh Valley Railroad was a party, and are not, therefore, evidence against it.

At the suggestion of the Court, Mr. Gowan is to renew this motion at a later date.

20th. Plaintiff's counsel offer in evidence the finding of fact on page 92 of the Interstate Commerce Report, beginning with the latter part of the paragraph found on that page with the words, "The defendants in the case against the Western New York and Pennsylvania Railroad Company," and ending with the words, "To New York Harbor points."

(Counsel for defendants object to the offer, unless the whole section, beginning with Division 11, be read at the same time, in order

to explain the context in which the finding of fact offered
360 occurs.)

The Court thereupon directed that the whole of the finding of the Commission, beginning at the heading 11 down to and including "to New York harbor points," be read and considered in evidence; and the same was read as follows:

"The question of the reasonableness in themselves of *of* the rates now in force, exclusive of the charge for the barrel package in barrel shipments, will be next considered.

"The defendants in the case against the Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company, the Delaware and Hudson Canal Company, the Fitchburg Railroad Company, and the Boston and Maine Railroad Company, form a route over which petroleum products are transported in carloads from the Pennsylvania oil regions to Boston and New England points; the defendants in the case against the Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company, and the Lehigh Valley Railroad Company form a route over which such transportation is conducted from such oil regions to New York harbor points."

21st. Counsel for plaintiff offer the finding of fact found on pages 93 and 94, beginning on page 93 with the words, "In many instances the same railroad forms a link," and concluding with the table found on page 94:

"In many instances the same railroad forms a link in several routes. The Western New York & Pennsylvania Railroad is the initial carrier in each of the three routes formed by the roads complained against and is also the initial carrier in most of said other routes. All of these routes form two classes; one composed of those carrying for the New England trade or Boston points and the other, of those carrying for New York harbor and vicinity, mainly for export. Each class, respectively, maintains the same rates. Those rates, so far as shown by tariffs on file with this Commission up to date have been as follows:

Tariffs issued by Western N. Y. & Penna. R. R. Joint with following lines:		To New York from Titusville and Oil City.		To New York Harbor points.					
				To Jersey City from Titusville and Oil City.		To Perth Amboy from Titusville and Oil City.		To Communipaw from Titusville and Oil City.	
		In bbls.	In T. cars.	In bbls.	In T. cars.	In bbls.	In T. cars.	In bbls.	In T. cars.
N. Y. Lake Erie & West'n R. R.									
November 10, 1887.	Per Bbl.			58	(From			52	(From
March 3, 1888.	" "			52	Titusville.)				Titusville.)
September 3, 1888.	Per 100 lbs.			16½	16½				
October 17, 1889.		18½	18½						
West Shore R. R.									
April 23, 1887.	Per Bbl.	58		58				52	
July —, 1887.	" "								52
September 3, 1888.	Per 100 lbs.	18½	18½						
February 10, 1892.	" " "	19½	19½						
D. L. & W. and Delaware & Hudson Canal Co.'s R. R.									
December 15, 1888.	" " "	18½	18½						
NOTE.—Rates withdrawn Oct. 24, 1891.									
Lehigh Valley R. R.									
September 3, 1888.	" " "	18½	18½	18½	18½	16½	16½		
NOTE.—Rates to New York withdrawn October 20, 1891.									
Issued by Pennsylvania Railroad. (Green Line.)									
April 8, 1887.	Per Bbl.							52	52
February 20, 1888.	" "			52	52	52	52	52	52
September 3, 1888.				66	52	66	52	66	52

362 To Boston Points.

Tariffs issued by Western New York & Pennsylvania R. R. Joint with the following lines:	Per bbl. (From Titusville.)	To Boston and Boston points from Titusville and Oil City. In bbls.	In T. cars.
N. Y., Lake Erie & West'n R. R.			
Nov. 10, 1887	.....	78	
(NOTE—This rate withdrawn by rates shown on Fitchburg R. R.)			
Fitchburg R. R.			
Sept. 3, 1888	Per 100 lbs.	25	25
Dec. 15, 1888	" " "	23½	23½
West Shore R. R.			
April 23, 1887	Per bbl.	78	
July, 1887	" "	.....	87½
Sept. 3, 1888	Per 100 lbs.	25	25
Dec. 15, 1888	" " "	23½	23½
D. L. & W. and D. & H. Canal Co.'s R. R.			
Sept. 3, 1888	" " "	25	25
Dec. 15, 1888	" " "	23½	23½
Issued by Penn'a R. R. (Green Line).			
Feb. 20, 1888	Per bbl.	78	78
Oct. 31, 1888	" "	100	78
Jan. 1, 1889	" "	94	74

Counsel for plaintiff stated that the pertinent part of the table just offered is "Lehigh Valley Railroad, September 3, 1888," showing then the rate of 16½ cents in barrels to Perth Amboy.

22d. Counsel for plaintiff offer as their 22d finding of fact, the last paragraph on page 95, following the table shown on that page.

Counsel for the Lehigh Valley Railroad objected to the offer, as relating exclusively to rates over the Western New York & Pennsylvania Railroad, and not in any way affecting the Lehigh Valley, but, his attention being called to the last part of said paragraph, withdrew his objection to that portion, and the offer was thereupon made as follows:

"Beginning at January, 1885, the open rate of 52 cents
363 was paid without any rebate, and from January, 1886, to Sept. 3, 1888, the rate by all lines to New York was generally 52 cents per barrel."

23d. As their 23d finding of fact, counsel for plaintiff offer the last two sentences of the paragraph which is completed on page 97, and the same was admitted without objection:

"The evidence tends to show that under this contract the rate of 52 cents per barrel for tank and barrel shipments was put in force both by the pipe lines and by the Pennsylvania Company, and was thereupon adopted by all the class of lines to New York harbor points. September 3, 1888, notice was given of an advance on barrel shipments to become effective September 13, 1888, making the rate on such shipments 66 cents per barrel."

24th. Plaintiff offer the next succeeding paragraph on page 97, which is admitted without objection, to-wit:

L IN BOOK

"On the basis of the estimated or constructive weights placed by the carriers on oil by the gallon in tank shipments and on the barrel and its contents in barrel shipments (which weights will be considered further on), both the 52 cents rate and the 66 cents rate amounted (when they were adopted) to 16½ cents per hundred pounds of oil transported."

Counsel for defendants (Mr. Gowen) calls the attention of counsel for plaintiff to the fact that he thinks part of this finding of fact, which is found on page 98 has been omitted, and should go in.

25th. Whereupon counsel for plaintiff offer as their next finding of fact the following from page 98 and 99.

"The following tables introduced in evidence on the part of the defendants show the rate, to within a small fraction, per ton per mile under present through rates, exclusive of the charge for the barrel package from Oil City over the routes named to New York, to New York harbor and to Boston:

364 Oil City to New York.

18½ cents per 106, $3.70 per ton.
Rate per ton per mile via different routes:
Via W. N. Y. & P. and P. R. R., 526 miles, 7 mills.
Via W. N. Y. & P. and West Shore, 566 miles 6.5 mills.
Via W. N. Y. & P. and N. Y. L. E. & W., 520 miles, 7.1 mills.
Via W. N. Y. & P. and N. Y. C. & H. R. R., 582 miles, 6.3 mills.
Via W. N. Y. & P. and D. L. & W. R. R., 547 miles, 6.7 mills.
Via N. Y. P. & O. and N. Y. L. E. & W., 551 miles, 6.7 mills.
Via L. S. & M. S. and N. Y. C. & H. R. R., 650 miles, 5.6 mills.
NOTE.—In the above rate to New York City is included a lighterage charge, making it two cents higher than the rate to New York harbor points—the present rate is 19½ cent per cwt.

Oil City to New York City.

16½ cents per 100, $3.30 per ton.
Rate per ton by mile via different routes.
Via W. N. Y. & P. and Lehigh Valley, 538 miles, 6 mills.
Via W. N. Y. & P. and P. R. R., 526 miles, 6.2 mills.
Via N. Y. P. & O. and N. Y. L. E. & W., 551 miles, 6 mills.

Oil City to Boston.

23½ cents per 100, $4.70 per ton.
Rates per ton per mile via different routes.
Via W. N. Y. & P. and P. R. R., "Wilkesbarre Route" 747 miles, 6.3 mills.
Via W. N. Y. & P., West Shore and N. Y. & N. E. R. R., 738 miles, 6.3 mills.
365 Via W. N. Y. & P. and N. Y. L. E. & W. and Fitchburg, 64[illegible] miles, 7.3 mills.
Via W. N. Y. & P., N. Y. C. & H. R. R. R. and B. & A. R. Rds., 636 miles—7.3 mills.

Via W. N. Y. & P., West Shore and Fitchburg, 633 miles—7.4 mills.

Via W. N. Y. & P., D., L. & W. D. & H. C. Co. and Fitchburg, 676 miles—6.9 mills.

Via N. Y. P. & O., N. Y., L. E. & W. and Fitchburg, 669 miles—7 mills.

Via L. S. & M. S., N. Y. C. and B. & A. R. R., 713 miles—6.5 mills.

26th. As their next finding of fact, counsel for plaintiff offer the following, being the succeeding paragraph on page 99, including the table on page 100:

"The average receipts per ton per mile and estimated cost of carrying a ton a mile for the year ending June 30, 1888, 1889 and 1890, as appears from the reports of the roads named on file with this commission, are shown in the following table:

366 Counsel for defendants object to the foregoing offer as incomplete, and that the first paragraph on page 101 should be offered and read in the same connection.

Whereupon counsel for plaintiff state that they will withdraw their 26th offer; that they have no objection to the paragraph mentioned being put in evidence, but do not desire to offer it as a part of their case; that they are offering the findings of fact that bear upon the question at issue, and do not wish to offer findings which do not bear upon question at issue here; that they are perfectly willing to have the report of the Commission go in as a whole, but do not wish to have facts go in as offered by them, which do not bear upon any question now before the Court.

By Mr. PATTERSON: We also object to the preceding offer 25, on the ground that it does not involve the whole of the finding in this connection.

Counsel for plaintiff then state that they will also withdraw their 25th offer.

Mr. Gowen, of counsel for defense, objects to the withdrawal of offer 25, on the ground that the complainants must put in the findings of fact as a whole.

By the COURT: But they say they are willing to put in the whole report.

Counsel for defendants state that of course they cannot put in arguments, but that they should put in the whole of the finding of fact, and not simply offer a portion thereof, and they ask that the offers of fact made by counsel for plaintiff shall be offered complete and in entirety, so that each finding of fact shall include all the pertinent matter immediately connected therewith.

By the COURT: We will permit offer 25 to be withdrawn and note an exception to the defendants; remarking at the same time that the counsel for plaintiff here stated that they have no objection whatever to the admission of offer 25, if the same is made by the defendants, so that they may be relieved from the responsibility of making the offer.

367 An exception to this ruling is noted to the defendant.

Counsel for defendants state to the Court that they are will-

ing that the offer shall be made under their objection and against the protest of the plaintiff, but that said offer, being of a finding of fact, and so offered by plaintiff, cannot be withdrawn; defendants being willing in any way to permit the plaintiff the right to dispute or controvert the finding, if it is thought proper.

27th. As their 27th offer, counsel for plaintiff offer the order made by the Commission as found on pages 122 and 123 of the record.

Offer objected to by counsel for defendants, as not being a finding of fact; the order of the commission is not evidence in the case; and objected to, generally, as incompetent and irrelevant.

Counsel for plaintiff state that they desire to offer the order, to show what it was that was disregarded and disobeyed by the defendants in the case; the fact that the order was made being already an admitted fact in the pleadings of the case, and they now desire to show what that order was.

Counsel for defendants hold that the commission had no power to make any order of reparation, the Act of Congress being that the Commission should make its findings of fact and a recommendation for reparation, and they therefore object to the admission of said order.

By the COURT: The objections are overruled, and this order is admitted in evidence—not as a finding of fact, but as an act of the commission in compliance with the statutory powers, and as constituting the ground, or one of the grounds upon which this statutory remedy is based; the order to have no other effect with the jury than simply to show a basis for this present proceeding by petition.

To which ruling an exce-tion is noted to defendants.

368 Counsel for plaintiff thereupon read their 27th offer, the same being found on pages 122 and 123 of the record of the Commission, and being as follows:

"It is further ordered, That the defendants cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants, and others who may apply therefor, for the purpose of loading and shipping oil therein to such New York harbor and Boston points as the shipper may direct; and that said defendants notify the public accordingly by publication in their tariff of rates and charges, pursuant to the provisions of section 6 of the Act to Regulate Commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section. It is further ordered that the rate on shipments of oil both in tanks and barrels over said roads shall be the same and said rate from said oil regions to New York points shall not exceed 16½ cents per hundred pounds, and to Boston and Boston points shall not exceed 23½ cents per hundred pounds; and the defendants are required to refund to the several parties legally entitled thereto, within 60 days after

notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package on shipments of oil in barrels, when the use of the tank cars has not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use."

26th. Plaintiff now offers the order as formally drafted by the Commission, as found in "Exhibit E" of their report, and printed at pages 129 to 133, both inclusive.

369 Counsel for defendants renew their objections to the admission of this formal order, for the reasons stated in their objection to the order which has just been read in evidence, and for the further reason that the order is a joint order made in three cases before the commission, to only one of which the Lehigh Valley Railroad, one of the parties to the present proceeding, was a party.

Admitted under the same ruling as the preceding offer, and an exception noted to the defendants.

Counsel for plaintiff thereupon read the order, as follows:

"At a general session of the Interstate Commerce Commission held at its office at Washington, D. C., on the 14th day of November, A. D. 1892.

Present: Hon. William N. Morrison, chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements, commissioners.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PA., and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PA.,

vs.

THE WESTERN NEW YORK & PENNSYLVANIA RAILROAD CO., THE NEW YORK, LAKE ERIE & WESTERN RAILROAD CO., THE DELAWARE & HUDSON CANAL CO., THE FITCHBURG CO., and THE BOSTON & MAINE RAILROAD CO.

SAME

vs.

THE WESTERN NEW YORK & PENNSYLVANIA RAILROAD CO., THE NEW YORK, LAKE ERIE & WESTERN RAILROAD CO., and THE LEHIGH VALLEY RAILROAD CO.

SAME

vs.

THE PENNSYLVANIA RAILROAD CO. and THE WESTERN NEW YORK & PENNSYLVANIA RAILROAD CO.

370 These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and investigation of the matters and things herein involved having been had, and the commission having on the date hereof made and filed a report and opinion containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order, and the com-

mission having, as appears by said report and opinion, found and decided, among other things, that the wastage allowance of forty-two gallons per tank car heretofore deducted by defendants from shipments of petroleum oil in such cars before computing freight charges thereon, and the method of estimating weight of such oil shipped in tank cars and in barrels by which the shipper in tanks was enabled to secure the transportation of a greater amount or weight of oil for the same aggregate sum as was charged for a like service in the transportation of oil in barrels, were and are unlawful; that the action of the defendants in charging for the weight of barrels on shipments of refined oil in barrels over the several through lines formed by their respective railroads from Titusville, Oil City, and other points in the oil regions of Western Pennsylvania, to New York and other points on New York harbor, or to Boston and points called and known as Boston points, works unjust discrimination against the shipper of such oil in barrels in favor of shippers of the same commodity in tank cars, while said defendants refuse or neglect to furnish tank cars to complainants and other shippers for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; that rates per hundred pounds on shipments of oil in tanks or in barrels should be the same, and from said points in the oil regions of Western Pennsylvania to New York harbor and Boston points such rates should not exceed 16½ cents and 23½ cents respectively, and that defendants should make reparation to complainants and others in all cases where charges on ship-
371 ments in barrels between those points have included a charge for the weight of the barrel, and tank cars have not been open impartially to shippers of refined petroleum oil over their lines:

"It is ordered and adjudged, That the defendants, The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company, The Delaware and Hudson Canal Company, The Fitchburg Railroad Company, The Boston and Maine Railroad Company, The Lehigh Valley Railroad Company, and The Pennsylvania Railroad Company be, and they severally are hereby, required to base charges for the transportation of refined petroleum oil over their lines upon the actual weight of shipments, whether in tanks or barrels, except in cases where such actual weights cannot be ascertained without great inconvenience, when such a rule or method of estimating weights shall be adopted and employed by them as will practically operate to secure to any shipper of such oil in barrels the transportation of an amount or weight of freight equal to the amount or weight of freight which, for the same aggregate sum, they contemporaneously carry or offer to carry between the same points for any shipper of such oil in tanks, and that these cases be held open for such further and more specific directions in regard to such assumed or estimated weights as may hereafter appear necessary, and that said defendants and each of them do also abstain from allowing on shipments of petroleum in tank cars a deduction of 42 gallons

per tank before freight charges are computed or any such allowance or deduction whatever, unless a corresponding and equivalent concession be made on shipments of such oil in barrels."

"It is further ordered and adjudged, that said defendants be, and they severally are hereby, required to wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipment of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points, or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct, and that on or before the 9th of January, 1893, said defendants notify the public accordingly, by publication in their tariffs, of rates and charges, pursuant to the provisions of Section 6 of the Act to Regulate Commerce, and also file copies of said tariffs with this Commission, as required by the provisions of said section; and defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within 60 days after notice of this decision and demand thereof by such parties, all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels when the use of tank cars has not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use; and inasmuch as the amounts wrongfully received from claimants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary.

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"It is further ordered and adjudged, that the rate on shipments of refined petroleum oil, both in tanks and in barrels, over said roads or lines shall be the same, and that said rate from said oil regions to New York points shall not exceed 16½ cents per one hundred pounds, nor shall said rate from said oil regions to Boston and Boston points exceed 23½ cents per hundred pounds, and said defendants are hereby required to arrange their tariffs of rates and charges accordingly.

"It is further ordered, that a notice embodying this order be forthwith sent to each of the defendant corporations, together with the report and opinion of the Commission herein, in conformity with the fifteenth Section of the Act to Regulate Commerce."

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Counsel for Plaintiff now offer in evidence, the findings of fact of the Interstate Commerce Commission as found in their report and order on the subject of Reparation, marked Exhibit "H" as referred to in the Plaintiff's petition and as admitted in the answer of the defendants.

Counsel for Defendants renew their objections generally made to the offer of findings of fact by the Commission in the first instance, which objections are as follows:

(1.) That the offers are not of any separate and distinct findings of fact by the Interstate Commerce Commission.

(2.) The offers as made are excerpts from argument and conclusions of the Interstate Commerce Commission, separated from their context and containing conclusions of law as well as statements of fact and illustrations.

(3.) The findings of fact are not presented distinctly and as a separate part of the Report, as directed by the Act of Congress.

(4.) The findings of fact are not evidence against the defendants for the purpose of making out a *prima facie* case, for the reason that defendants are entitled to a trial by jury without prejudice to their case by any former inquiry or hearing whatsoever.

(5.) Counsel for defendants objects to the admission of the findings of fact in evidence upon the ground that many of the findings offered in evidence relate to matters not applicable to the through line made up of the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad, but had solely to do with questions at issue with other routes, defendants in entirely separate proceedings, but as to which the testimony was taken by the Commission as a whole, under an agreement that it should apply only to the lines affected by it.

374 (6.) The offer is further objected to, for the reason that the findings of fact offered in evidence do not include all the findings contained in the Report of the Commission.

(7.) The offer is objected to, as generally incompetent and irrelevant.

(8.) Counsel for the Western New York and Pennsylvania Railway Company further object to said findings as in any view of the case evidence against them, for the reason that the said Railway Company was not a party to the proceedings before the Interstate Commerce Commission, and cannot therefore be affected by any findings of fact, statements, or other matter contained in the Report.

(9.) Counsel for Samuel G. De Coursey, Receiver of the Western New York & Pennsylvania Railroad Company, further specially objects to the said alleged findings of fact being offered in evidence as to any rights of the said Receiver, for the reason that the said Receiver was not a party to the proceedings before the Interstate Commerce Commission in which the said findings of fact were made and entered.

(10.) And the additional objection, that the Interstate Commerce Commission had no power or authority to make the order of reparation as entered by them and is now offered by the plaintiff.

(11.) That the order or recommendation of the Interstate Commerce Commission on the subject of reparation is not evidence against the defendants in this proceeding; and it is generally incompetent and irrelevant.

By the COURT: The objections to the admission of this order as an order are overruled. The order is received in evidence and its effect is restricted simply as showing the basis on which this statutory proceeding by petition is based, and is not to have any binding

effect as an order upon the jury; to this extent, and to this extent only, the order is admitted as such in evidence.

375 As to the findings of fact contained or embraced in the order, as are of opinion that the objections thereto should be overruled. We are of opinion that these findings of fact are made *prima facie* evidence under the Act of Congress, and, further, that the question of the Western New York & Pennsylvania Railway Company not being bound by this record has been passed upon by this Court in a former stage of this proceeding in an opinion filed on the — day of —— and reported in 82 Fed. Rep., 192.

To which ruling of the Court defendants ask for an exception and the same is noted.

Pursuing the offer already made and ruled upon, the plaintiff offers the following:

(A.) The first, second and third paragraphs of the report of the Interstate Commerce Commission on the subject of reparation as found on pages 142 and 143 of the plaintiff's petition which is simply a recital of the fact that the Order of November 14, 1892, was made, and the substance of that order, so far as pertinent to reparation, as follows:

"Upon a report and opinion filed, and by order entered herein on November 14, 1892, the defendants in the above entitled cases, among other things as follows:

To cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; and that, on or before the ninth day of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges, pursuant to the provisions of

376 Section 6 of the Act to regulate Commerce, and also file copies of said tariffs with this Commission, as required by the provision of said Section:"

"And said defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within 60 days after notice of this decision and demand thereof by such parties, all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels, when the use of tank cars has not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use; and inasmuch as the amounts wrongfully received from complainants, and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary."

(B.) The paragraph beginning on page 143 and ending on page 144, as follows:

"The above mentioned portion of said order has not been complied with by the defendants in these cases in any respect. Upon application of counsel for various claimants seeking reparation under the order, a hearing to ascertain what amounts had been wrongfully received from complainants and others who may be entitled to such reparation was held at Titusville, Pa., on May 15 and 16, 1894. Proof was then submitted by claimants as to their respective demands, but as copies of the claims presented had not been served upon the defendant carriers, a stipulation was entered into between counsel for complainants and counsel representing the several defendants in this respect, to the effect that the claimants should serve copies of their claims upon the initial carriers, and that thereupon such carriers and the connecting carriers in the several routes would examine and check the various items set forth in the claims, and afterwards file the same, together with statements, with the Commission. This operated to delay the proceedings
377 until the terms of the stipulation should be carried out, or until the Commission should order some further order limiting the time of the parties to conform with such agreement. Considerable delay resulted from the failure of claimants to promptly serve copies of their claims, and the carriers also evinced no disposition to hurry this matter of reparation to a close. This continued until June 10, 1895, when the Commission issued an order directing the carriers to complete their examination of claims served under the agreement, and file the same with statements thereon not later than June 25, 1895. This time was extended by subsequent order, applied for by the Lehigh Valley Railroad Company until June 15, 1895. The claims which were served upon defendant initial carriers by claimants, the originals or duplicates thereof now being on file in these cases are the claims to be considered in this report."

(C) The following paragraph:

"These matters have been regularly heard and the defendant carriers have had full notice and ample opportunity to examine and oppose the claims."

(D.) The succeeding paragraph as follows:

"The defendants have not, as required by our order of November 14, 1892, notified the public by filing and posting oil tariffs, that they or either of them would supply shippers with tank cars for oil transportation to New York harbor or Boston points. Such cars are not and have not been open to the use of shippers generally on any of the defendant roads. On the contrary, before and since the complaints were filed in these cases, it has been the practice of the defendants to hire tank cars of owning shippers by paying mileage thereon, while at the same time denying other and competing shippers the right to use such cars and compelling them to ship their oil in barrels and pay transportation charges on the weight of the barrel."

378 (E.) The succeeding paragraph as follows:

"The parties legally entitled to reparation at the hands of the defendants under our order of November 14, 1892, are oil shippers from Titusville, Oil City, or points in the vicinity thereof, who were members of the complaining associations at the time the com-

plaints were filed or subsequently, up to the date of the hearing of these reparation matters at Titusville on May 15, 1894."

(F.) The next succeeding paragraph as follows:

"The time which will be considered as properly covered by claims for reparation in these cases is from September 3, 1888, the date when the practice of charging for carrying barrels containing oil was commenced, to May 15, 1894, when hearing on the claims was had."

(G.) The next succeeding paragraph, as follows:

"The shipments which may be included in the claims are those from Titusville, Oil City and vicinity to New York and New York harbor points and Boston and points taking Boston rates, and which passed over routes in which some one of the defendants was the carrier receiving the freight for transportation, initiating and controlling the method or mode of carriage, and billing the freight through to destination at the aggregate rates of compensation charged."

(H.) The next succeeding paragraph, as follows:

"The amount to be refunded is the charge collected by defendants for the transportation of barrels containing petroleum oil shipped and carried as aforesaid, and where this barrel charge had not been exactly figured and reported by the defendant initial carrier, such charge will, as found in our Report and Opinion of November 14, 1892, be 14 cents per barrel to New York harbor points and 20 cents per barrel to Boston and Boston points, except where a lower charge per barrel is demanded in said claims."

(I.) The following sentence from the first paragraph beginning on page 150:

379 "It is part of the proof that the cost of the transportation was an item of expense which was borne by the shipper and not by the consignee."

(J.) The second paragraph beginning on page 150 and ending on page 151, as follows:

"Of the various carriers named as defendants in these cases, in our Order of November 14, 1892, only the Western New York & Pennsylvania and the New York, Lake Erie and Western appear to have been initial carriers of oil shipments mentioned in the claims. These roads have been in the possession of Receivers and operated under the direction of United States Courts during a portion of the time properly covered by the claims. The affairs of the Western New York and Pennsylvania Railroad Company passed into the hands of Samuel G. De Coursey, as Receiver, on or about April 1, 1893, and said Receiver was operating this road on May 15, 1894, when the hearing of the matter took place. The New York, Lake Erie and Western Railroad Company has been, since on or about July 26, 1893, and still is, operated by Receivers appointed and controlled by a federal court. The Receivers now in possession of the properties of this company are J. G. McCullough and E. B. Thomas."

(K) A paragraph beginning on page 157, as follows:

"Following are the names of claimants, members of the complain-

ing associations who served their claims upon defendants' initial carriers, in accordance with the stipulation entered into by counsel for claimants and defendants on May 16, 1894."

Initial carrier, Western New York & Pennsylvania.

Penn Refining Co., Limited, Oil City, Pa.

John Schwartz & Co., Titusville, Pa.

Rice & Robinson, Titusville, Pa.

Rice, Robinson & Foggan, Titusville, Pa.

Independent Refining Co., Limited, Oil City, Pa.

380 Genie Wood, doing business under the trade name of The Oil Creek Refining Works, Titusville, Pa.

American Oil Works, Limited, Titusville, Pa.

Western Refining Co., Limited, Titusville, Pa.

S. Y. Ramage, doing business under the trade name of The Mutual Oil Co., Reno, Pa.

National Oil Co., Limited, Titusville, Pa.

Continental Refining Co., Limited, Oil City, Pa.

International Oil Works, Limited, Titusville, Pa.

(L) Paragraph on page 158, beginning with

"In accordance with the above stated rulings."

(This offer was objected to by counsel for defendants, as not a finding of fact within the Act of Congress, and as generally incompetent and irrelevant.)

By the COURT: In accordance with the ruling heretofore made, these objections are overruled and an exception noted to defendants.

The paragraph offered was then read as follows:

"In accordance with the above stated rulings and principals, we make the following findings and orders upon claims filed and served covering shipments of petroleum oil in barrels to New York and New York harbor points and Boston and points taking Boston rates, and which, between the 3rd of September, 1888, and the 15th day of May, 1894, were delivered by claiming shippers to the Western New York & Pennsylvania Railroad Company or its Receiver for transportation to said destinations.

At this point in the reading of this offer, counsel for defendants make special objections to the portion about to be read showing the amount of damages reported by the Commission in favor of the Penn Refining Company against the defendant, as not a finding of fact but as a conclusion of the Commission, and not bearing on the matter now in issue to be considered by this jury; and further, that the order itself shows that it was made upon incompetent testimony,

381 the amount due having been arrived at by the Commission, as appears from the order itself, on figures embraced in a claim filed by the plaintiffs with a statement endorsed thereon by the Western New York & Pennsylvania Railroad Company, without any competent evidence having been given to sustain the same, and generally, as incompetent and irrelevant.

The Court reserved its decision on this objection, but permitted the reading of the offer, which was as follows:

"The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York

& Pennsylvania Railroad Company, and Samuel G. De Coursey, the Receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of eight thousand five hundred and seventy-nine dollars ($8,579.00), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company or to its said Receiver, for transportation over the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad from Oil City, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York & Pennsylvania Railroad Company, and its said Receiver, and the said Western New York & Pennsylvania Railroad Company, and Samuel G. De Coursey, the Receiver thereof, and the Lehigh Valley Railroad Company, are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of eight thousand five hundred and seventy-nine dollars ($8,579.00), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894."

382 Mr. Gowan, of counsel for defendants, renews the motion to strike out all the findings of fact and orders which have been given in evidence, upon the ground that these all relate to the question of lawfulness and reasonableness of the charge for the carriage of the barrel package by comparison with the charge made for the shipment of oil in tank cars, and that no such issue was raised in any proceeding before the Interstate Commerce Commission to which the Lehigh Valley Company was a party, and therefore such findings of fact and orders can have no relevency, or cannot be used as evidence against that company.

By the COURT: This request is overruled, *pro forma*, as the Court is not sufficiently advised from the multiplicity of testimony, to determine it; and the counsel for the Lehigh Valley Railroad Company is requested to present the request later in the form of a point, or in some other way, to call it to the attention of the Court.

Exception noted to defendant.

Counsel for plaintiff offer in evidence the order of sale in the case of Wm. G. Mendenhall, a citizen of the State of Delaware, complainant, and the Western New York and Pennsylvania Railroad Company, a corporation existing under and a citizen of the State of Pennsylvania, and the Fidelity Title and Trust Company, a corporation existing under the laws of the State of Pennsylvania, in the Circuit Court of the United States for the Western District of Pennsylvania, at No. 18 May Term, 1893, said order having been made on October 18, 1894, wherein it is provided, *inter alia*, as follows:

"Such scale to be subject, however, to all executory contracts made by the receiver in this suit under the authority of the Court, of which contracts the receiver is directed to give the trustee a full and accurate statement; and subject, also, to all the debts and liabilities of the receiver and to all after-maturing interest upon the first

mortgage bonds and all car trust obligations and equipment notes now outstanding; such debts and liabilities, if any will remain a lien upon the premises until discharged."

383 It is agreed, that if anything that is pertinent in this record just offered will be considered in evidence for all purposes.

Court here took a recess until 2 o'clock p. m., and reconvened at the hour named.

Plaintiffs rest.

Testimony on Behalf of Defendants.

Mr. Patterson opened to the jury on behalf of the Defendants.

Testimony of Edward T. Johnson.

EDWARD T. JOHNSON, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. GOWAN:

Q. Where do you reside?

A. At Buffalo.

Q. What is your business?

A. At the present time?

Q. Yes.

A. Division Freight Agent of the Pennsylvania Railroad Company; Buffalo & Allegheny Valley Division.

Q. Were you at any time connected with the Western New York & Pennsylvania Railroad Company?

A. Yes, sir.

Q. For how long a period of time and between what dates?

A. As long as that corporation was in existence; I don't remember the date; but I have been practically in the same position with the different companies since 1873; that is, with the old Buffalo, New York & Philadelphia, and then the corporations that succeeded that.

Q. And from 1888 to 1894, I believe, you were the General Traffic Manager of the Western New York & Pennsylvania R. R. Co.?

A. General Freight Agent.

384 Q. As such, were you conversant with the method by which oil shipments were conducted over your road and its connections?

A. I was.

Q. Did you have between those years a so-called through rate for the shipment of oil from points on that road to Perth Amboy, N. J.?

A. Yes, sir.

Q. By what line was that through rate made in connection with yours?

A. In connection with the Lehigh Valley road.

Q. And Perth Amboy was its New York Harbor terminus?

A. Yes, sir.

Q. At whose request was that route and through rate between your road and the Lehigh Valley put in force?

A. I think it was originally at the request of the shippers, the refiners.

Q. What refiners?

A. The independent refiners, located at Titusville and Oil City.

Q. When was that route first established, if you can recall—about what year?

A. I should say about 1887 or 1888.

Q. Was that route for the shippers of oil to Perth Amboy availed of by any other shippers than the independent refiners?

A. No, sir.

Q. Whom do you mean by the independent refiners? Were they the same who were embraced as associates in the proceedings before the Commission in the case that we have referred to here?

A. Yes, sir.

Q. Do you know what facilities existed at Perth Amboy for the handling of oil at that point?

A. Not in detail; no, sir.

385 Q. Do you know who controlled the terminals there and to whom oil was consigned that was shipped over the Lehigh Valley?

A. Only as I understood from others; not by direct knowledge; that they were owned and controlled by an export company—I don't remember the name of it.

(Counsel for the plaintiff object to the question and the answer of the witness, because the witness does not know, of his own knowledge, according to his statement.)

Q. Can you state to whom oil was consigned that was shipped in that way?

A. I can't say in all cases, no sir.

Q. Will you please state whether, as a general rule, shipments to Perth Amboy were made in barrels or tanks?

A. In barrels.

Q. Then, I understand that you have testified that all the oil shipped to Perth Amboy was shipped by the independent refiners, parties to the proceedings that were had before the Interstate Commerce Commission?

A. Yes, sir.

Q. That refers to tank as well as to barrel shippers?

A. Yes, sir.

By the COURT: I understood that all of the shipments to this point were in barrels.

A. There were a very few tank cars; but in general they were in barrels.

By Mr. GOWAN:

Q. Can you tell us how long the shipments of oil to Perth Amboy continued?

A. I can't give you the exact date, but about to 1894 or 1895, I think.

Q. What class of oil had been shipped to Perth Amboy before that time?

A. We knew it as export oil, or 110 degree test oil.

Q. And by export oil, you mean oil intended for shipment by water abroad?

386 A. Yes, sir.

Q. What was the cause of the cessation of shipments to Perth Amboy?

A. A pipe line was laid and the oil was piped instead of being shipped by the railroad.

Q. In the case of these Perth Amboy shipments, where did you deliver the oil to the Lehigh Valley Company?

A. At Buffalo.

Q. So that you hauled from the point of origin to Buffalo and from Buffalo by the Lehigh Valley to Perth Amboy?

A. Yes, sir.

Q. And there was a through rate of freight covering the shipments from the point of origin?

A. Yes, sir.

Q. And that was governed how?

A. By a rate of percentage agreed upon by the two companies.

Q. Each taking a certain percentage of the through rate covering its haul?

A. Yes, sir.

Q. Do you remember what that rate was?

A. Not exactly; about 25 per cent. for the W. N. Y. & P. and 75 per cent. for the Lehigh Valley. Those are not the exact figures, but very close to it.

Q. Who fixed the rate accruing to your line, the proportion of the rate accruing to your line?

A. I did.

Q. Had the Lehigh Valley anything to do with it?

A. No, sir; only to agree to it.

By Mr. PATTERSON:

Q. If I give you the sheets showing the oil shipments by this claimant over the route of the defendant companies, can you tell me what proportion of overcharge there would be due for the operations of the road under the Receiver?

387 A. I could, after due time.

Q. Mr. De Coursey was appointed Receiver of the road on April 1, 1893. I hand to you the record of the testimony before the Interstate Commerce Commission, the first volume, showing the receipts of shipments in the case of the Penn Refining Company, limited. Are there any charges in that during the operations of the Receiver, or after the first of April, 1893?

A. No, sir.

Q. I show you the next, or supplemental report of receipts in the same case——

A. There is a secondary statement; that is, some few shipments——

By the COURT: What is that first sheet you showed him?

By Mr. PATTERSON: The first sheet shows the rate sheets of the Western New York & Pennsylvania R. R. Company in account with the Penn Refining Company, limited, as attached to the Interstate Commerce Commission's record of testimony.

By the WITNESS:

A. These shipments were all to Perth Amboy, with the exception of a few cars on the last two sheets. The shipments that were after the appointment of the Receiver were not consigned to Perth Amboy, but were to Newark, New Jersey, and one car to Buffalo, New York.

Q. Then, I understand you, there were no shipments shown by those sheets as to which there was improper charge under the ruling of the Interstate Commerce Commission?

A. No, sir.

Q. I hand you the second sheet in the same claim.

A. This is simply a summary, and doesn't show anything in detail; but, as I would understand it, the first part of it is covered by the statement I have already testified about.

388 Q. Is there any statement there of the overcharges under the ruling of the Commission after the date when the receiver went in charge, to wit, April 1, 1893?

A. There is a statement here, "To bill rendered on May 12," which I would understand to apply to the second bill that I spoke of.

Q. What do you mean by the second bill?

A. The one that was attached to the other shipments, showing miscellaneous shipments, to Newark, New Jersey, and the other to Buffalo, New York; some of those shipments were after the appointment of the Receiver.

Q. What is the amount of that bill?

A. $257.40.

Q. That bill that you have just referred to and say was served upon you, dated after the first of April, 1893, is made up, you think, of the shipments which appeared upon the former report?

A. Yes, sir.

Q. Will you look again at that former report and tell us the date of the last shipment made there?

A. April 13, 1894.

Q. And that is included in this $257.40?

A. Yes, sir.

Q. Will you look at that sheet again. I think I understood you correctly to say that none of those shipments which make up that second or supplemental bill were Perth Amboy shipments?

A. They were not?

Q. Then am I right that there are no items shown there which are a claim against the Receiver during his operation of the road for matters represented in this suit?

A. Yes, sir.

By Mr. GOWAN:

Q. While you have those bills before you, I wish you would state what is the last date of the shipments to Perth Amboy shown?

389 A. February 9, 1893.

Q. That is the last Perth Amboy shipment?

A. Yes; shown on this bill.

Q. Were there Perth Amboy shipments in this other batch of claims of a latter date?

A. I have not examined it.

Q. Then I will ask you that again.

Cross-examination by Judge MEHARD:

Q. You say that the through route from the oil regions of Pennsylvania—that is, in the neighborhood of Oil City and Titusville, through to Perth Amboy was established at the request of the independent refiners, by whom you mean those who have been instrumental in bringing these suits now pending?

A. I did not say the through route. I said the through rate. The route was already established by our general arrangement with the Lehigh Valley road covering all classes of freight.

Q. That is to say, you had a through route already established?

A. Yes, sir.

Q. Well, had you a through rate already established?

A. I can't say at the present moment just when that through rate was put in force.

Q. When was the first through rate for shipments of oil established for that through route?

A. Some time in 1887, I think it was.

Q. Do you refer to the rate that is complained of in this case, whereby there was a charge of 14 cents a barrel more for the barrel oil than there was for the oil carried in tanks—is that the rate you refer to?

A. I refer to the rate of 16½ cents per hundred pounds on the gross weight of the barrel and oil, estimated at that time at 400 pounds, I think it was.

390 Q. Do you say that it was established at the request of the refiners.

A. That is my recollection of it.

Q. What refinery requested that?

A. A number of them.

Q. Who were they?

A. The ones that are parties to this suit; I can't give you the names of the individuals. My recollection of it now is that Mr. A. D. Deming was one.

Q. Where is Mr. Deming now?

A. I think he is dead.

Q. Who else requested it?

A. I can only say in a general way, because it is a matter simply of recollection, that the different refiners, Mr. Rice, of Titusville, and some of the others at Oil City asked for the through rate.

Q. Asked for the through rate. Do you mean for this through rate?

A. For the 16½-cent rate.

Q. Charging for the barrel?

A. No, sir; asking us to establish a through rate to Perth Amboy.

Q. Well, do you mean to be understood that they asked you to establish the through rate of which they now complain?

A. Do you mean for the 16½-cent rate?

Q. I mean the through rate of which they complain, by which the barrel package is charged for when the oil is carried by barrel, and no charge made when the oil is carried by tank. Did they request that?

A. As I understand your question, no, sir; they did not request that.

Q. Were you present when the request was made?

A. They made it of me.

Q. Did they make it in writing?

A. No, sir.

391 Q. Where did they make it?

A. At my office in Buffalo.

Q. Who were present?

A. I can't tell you now.

Q. Who of the refiners were present besides Mr. Deming?

A. I don't know of there being more than one refiner present at any time.

Q. Did you have any communication with any of them on that subject by writing?

A. I can't say that at present.

Q. There was a through rate established to take effect on the 3d of September, 1888 which is complained of in this case. Do you recall that fact?

A. I do not at present.

Q. Do you recall the fact of shipments at a rate whereby 14 cents a barrel was charged, that is complained of in this case?

A. We never had such a rate as that.

Q. What rate did you charge?

A. 16½ cents per hundred pounds.

Q. Including the barrel?

A. Yes, sir.

Q. And you charged 16½ cents for oil carried in tanks, did you?

A. Yes, sir.

Q. And that was for oil?

A. Yes, sir.

Q. But nothing for the tank?

A. No, sir.

Q. And as soon as that was established, don't you remember that these independent refiners began to complain of that fact?

A. As soon as we established that charge for the gross weight, they did.

392 Q. And these suits are the outgrowth of that rate, are they not?

A. I think they are.

Q. You say that the oil was carried through to Perth Amboy until about the beginning of the year 1893—the last charge you mentioned being, I believe, in February of 1893?

A. That is the statement. In giving that date I give simply what is covered by the statement.

Q. As I understand you to say, when oil shipments ceased, they ceased because the oil commenced to be shipped by pipe line through to Perth Amboy?

A. No, sir, I didn't say that.

Q. What did you say?

A. I said that I was advised that it was being shipped in pipes. The first advise that we had was that it was being shipped to a point in Pennsylvania and put into tanks and then forwarded to Perth Amboy.

Q. I understand that you undertake to explain to the Court and jury why it was that the independent refiners ceased to ship their oil to Perth Amboy. Now, do you know why they stopped?

A. I am testifying only to the advices as they were given to me.

Q. Advices given to you by them?

A. By them, coming to me acting as Superintendent of the Western New York and Pennsylvania railroad as to why shipments were not made over the line.

Q. With whom did you have any conversation on that subject?

A. I can't say what individual it was.

Q. Did you have any conversation with the Penn Refining Company?

A. I can't say which individual I had that talk with.

Q. Did you never hear or did they never say to you that the reason they were stopping their shipments to Perth Amboy was be-
393 cause the facilities at Perth Amboy were falling into the hands of their rivals, the Standard Oil Company, and they were not getting fair treatment?

A. No, sir.

Q. You never heard that?

A. No, sir.

Q. Do you know, as a matter of fact, that they continued to ship oil by barrels after 1894, or the date that you say they stopped shipping to Perth Amboy?

A. To Perth Amboy do you mean?

Q. No, sir; to New York Harbor points.

Objected to by counsel for defense, that the question should be limited to Perth Amboy.

Objection overruled.

A. There have always been shipments of other grades of oil in barrels to New York harbor points, and are to-day.

Q. Have there not been shipments of export oil in barrels to New York harbor points since that time?

A. By the W. N. Y. and P. route.

Q. Yes, sir.

A. I have no knowledge of any.
Q. Since when?
A. I can't give the exact date when the refiners ceased their shipments by the Western New York & Pennsylvania; I can obtain that date by going to the records.
Q. Do you pretend to give it now?
A. No, sir, I do not.
Q. Did you pretend to give it in your direct testimony?
A. I only referred to the statements.
Q. To what statements?
A. That were submitted to me.
Q. I don't understand you. Any statements that were made by any of the parties to this suit by any of the Penn Refining Company?
394 A. The statements that are covered by these papers here.
Q. The statements in the book, then, is what you mean?
A. Yes, sir.
Q. Well, the last shipment, according to that statement was in February, 1893?
A. Yes, sir.
Q. And that statement goes from February, 1893, until some time in 1894?
A. There's a supplementary statement in 1894.
Q. But I mean the statements to which your attention was directed in your direct examination—they covered a period down to April of 1894, did they not?
A. There are shipments reported up to that date.
Q. But the last shipment, you say, which those statements show of oil to Perth Amboy was in February, 1893?
A. Yes, sir.
Q. Well, then, according to that the indication is that shipments to Perth Amboy by the Penn Refining Company ceased in February, 1893?
A. That is my understanding of it.
Q. Well, don't you know that no export oil or refined oil was shipped in pipe lines until nearly a year after that time?
A. I do not.
Q. But if that is a fact, then you were mistaken as to that being the reason why they ceased at that time?
A. I give it to you as it was given to me.
Q. According to your present recollection, after all these years?
A. Yes, sir.
Q. May you not be mistaken in your recollection?
A. I might be.

395 *Testimony of D. A. Walker.*

D. A. WALKER, a witness called on behalf of defendants, bein duly sworn, testified as follows:

Direct examination by Mr. GOWAN:

Q. Where do you reside?
A. In Newark, New Jersey.
Q. What is your present business?
A. I am a clerk in New York City.
Q. In what company?
A. The Lehigh Valley Railroad Company.
Q. Did you hold any position with that company the year 188 to 1894, including both those years?
A. Yes, sir.
Q. What was it?
A. Freight agent.
Q. At what point?
A. At Perth Amboy.
Q. And what were your duties as freight agent at that time; will ask you specially with reference to any business coming to tha point?
A. Well, I had entire charge, in collecting the freights, and seein that the goods were delivered.
Q. You had charge of collecting freights and seeing that the good were delivered?
A. Yes, sir.
Q. During the time that you have mentioned—that is, from 188 to 1894, including the year 1894, what facilities, if any, existed a Perth Amboy for the handling of oil shipped in tank cars?
A. Previous to 1894, they had no facilities at all. We handle the tanks on the track until they were ready to receive them.
Q. Now, in what way was oil that was rece[illegible] in tank car handled?
A. Emptied into barrels.
396 Q. It had to be barreled at Perth Amboy?
A. Yes, sir.
Q. What was the name of the consignee, or the company or part nership that received all the oil that came to Perth Amboy durin the years I have mentioned?
A. The United Refiners Export Oil Company.
Q. Then I understand that all the oil that was received at Pert Amboy from the year 1888 to 1894, including both years, came a assigned to that company?
A. That is, for export; with the exception of a company name Holmes & Adams that used to ship oil for export, and this compan used to handle it.
Q. And in this case it was consigned to that company?
A. Yes, sir.
Q. I wish you would state, so that the Court and jury can unde

stand the matter clearly, what was the method pursued in handling all this export oil that came to Perth Amboy, whether in barrels or in tanks?

A. The United Export Oil Company had a plant of their own at Perth Amboy.

Q. Just say what this plant was?

A. They had docks down there; they had a plant fitted to handle barrelled oil, oil in barrels, and the oil came there loaded in barrels and in stock cars; the barrels were unloaded from those stock cars after we switched them down to their plant, and they then recoopered those barrels and shipped those same barrels onto vessels for export—the same packages.

Q. How about the tank car oil?

A. Previous to, I think, the summer of 1894—after we had been frequently insisting upon them to relieve our cars—for some times they held cars there as long as six weeks at a time on our tracks and we were constantly at them to get the cars released——

Q. What cars do you mean?

397 A. The stock cars, the cars that held the barrel oil, And then they decided, on our constant urging them and threatening to charge a demurrage on them—they decided then to build tank cars.

Q. But prior to that time, prior to the time of their decision to build the tank cars that you speak of and to provide for tank shipments of oil to Perth Amboy, how was oil that came to Perth Amboy intended for export, when it arrived in tank cars, treated?

A. In that case they had to unload and fill it in barrels at Perth Amboy.

Q. And what was done with those barrels?

A. They were exported.

Q. You are speaking now of the change that took place in 1894, at the time that this United Refiners Export Oil Company decided to build tank cars. Did they also at that time do anything in the way of furnishing facilities for the storage of tank oil?

A. Yes; they erected two tanks there, each tank said to contain a thousand barrels.

Q. After the erection of those storage tanks and the construction of those tank cars that you have mentioned, how long did the export oil business continue to Perth Amboy?

A. Well, about from 1894 to 1896, somewhere around there; it may be later or it may be earlier; I am not sure about that.

Q. When did you leave Perth Amboy?

A. I left there in 1898.

Q. Had the business ceased before that?

A. Yes, sir.

Q. How long a time before that, probably?

A. Well, I should judge a year to eighteen months.

Q. I will ask you, Mr. Walker, whether there were any facilities at Perth Amboy for the loading of tank steamers?

398 A. Yes; after they got those tanks there, if a tank steamer would come in, they would run the oil right into it from those storage tanks.

Q. But before that time were there any?

A. No, sir.

Q. So that before that time it was not possible, with the facilities at Perth Amboy, to export oil in tank steamers?

A. No, sir.

Q. How large a plant was this United Refiners Oil Company Plant? By that I mean what was its area?

A. About an acre.

Q. Would it have been possible to have handled with their facilities all the oil that came there in barrels, if they had promptly unloaded the cars?

A. Oh, no.

Q. As I understand you, the oil went down in barrels in box cars, and was held there until the vessel arrived which was to be loaded, and you say that frequently had resulted in the holding of cars loaded in that way for six weeks at a time?

A. Yes, sir.

Q. On whose property were these cars standing at the time?

A. On the Lehigh Valley Railroad's.

Q. Standing in their yards at Perth Amboy?

A. Yes, sir.

Q. What detriment, if any, was that to the company?

A. It was a large detriment to the company, because they took up the room that we had to handle other freight, and frequently we had to switch cars backward and forward five or six times, and perhaps a dozen times, in order to facilitate the business.

Q. In the case of the oil that came there in tank cars and which you say was barreled, where did the barrels come from?

399 A. I don't know where they came from, they came by water, by lighter, from somewhere, I don't know where.

Q. They reached Perth Amboy by lighter, from some point, you don't know where?

A. Yes, sir.

Q. After the oil was barreled, what was done with the barrel, if anything?

A. They didn't put the oil in the barrel until the vessel was ready to take the oil in the barrels.

Q. I mean, the barrels themselves subjected to any treatment, in the way of painting or coopering?

A. Oh, yes, they had to prepare the barrels ready to receive the oil.

Q. Of what did that consist?

A. They had to paint them on the outside; that's about all I know. They painted them green; that's all I know.

Q. Prior to the construction of these railroad tanks, was the oil that came there in tank cars large or small—was the proportion of oil that came there in tank cars a large proportion of the whole, or a small proportion?

A. Small, very small. The larger proportion was in barrels.

Q. About what proportion would you suppose was in barrels—just to give us some idea?

A. Well, there would be a hundred cars of barreled oil, possibly, where there wouldn't be one in tank.

Cross-examination by Judge MEHARD:

Q. In whose employ do you say you are at the present time?
A. The Lehigh Valley Railroad.
Q. And have been since 1888?
A. Yes, sir.
Q. Were you prior to 1888?
A. Yes, sir.
400 Q. But in 1888 you were at Perth Amboy?
A. Yes, sir.
Q. Connected with the freight department of the Lehigh Valley Railroad at Perth Amboy?
A. Yes, sir.
Q. I understand you to say that the oil which was shipped from the oil regions of Pennsylvania in 1888, and year subsequent thereto, to Perth Amboy, was consigned to a certain company. Will you give us the name of that company again?
A. The United Refiners Expert Oil Company.
Q. What kind of a company was that? What was its business?
A. As I understood, they were independent shippers.
Q. Wasn't it a storage company?
A. No, sir.
Q. Didn't it have storage facilities?
A. Oh, they stored some oil there, preparatory to vessels coming in and taking it. That's all.
Q. It had storage facilities for barrels as well as for other oil, hadn't it?
A. For barrels, yes.
Q. Its storage was chiefly for barrels, until these tanks were erected?
A. Yes, sir.
Q. And it had storage houses there for barreled oil?
A. Yes, sir.
Q. When the oil was brought there in barrels, wasn't it taken out of the cars and put into storage?
A. Yes, they put all they could there until they were filled up, and then the railroad would have to hold the goods in the cars.
Q. So that the cars which were left on the track that you refer to were only such as came in after the storage was full?
A. Oh, no.
401 Q. Well, they kept on putting it into storage as long — there was room?
A. Yes, sir.
Q. Then I say, when there was any room in storage, they took the barrels out of the cars and put them in storage?
A. Yes, sir.
Q. So that any cars that would be left standing for any length of time on the track filled with barreled oil were such as came there after the storage was filled, and could not be unloaded?

A. Well, often times they had two or three hundred cars standing there, and if a vessel would come in that would relieve their storage and they would then take some of these cars and fill up their storage again, and still, out of perhaps two hundred cars, they would only be able to take fifty, and there would be a hundred and fifty left.

Q. But they would keep on filling in their storage as long as there was room.

A. Yes; but of course their storage there was limited.

Q. And you say that in the course of time there were tanks erected?

A. Yes, sir.

Q. When was that?

A. I think, as far as I can recollect, that was about 1894, or 1893; somewhere along there.

Q. In 1893 or 1894?

A. Yes, sir.

Q. Don't you recall that there was a change in the ownership of this storage company, the United Refiners Export Company?

A. No, sir.

Q. You don't recall that fact?

A. There was no change.

Q. You don't know of any change in the management?

A. No, sir.

402 Q. Or in the persons who were controlling it?

A. No, sir.

Q. You speak of these tank cars—what tank cars were they?

A. They were tank cars supposed to be built by the United Refiners Export Oil Company and they had their initials on the cars.

Q. I am waiting to know what the cars were marked?

A. The United Refiners Export Oil Company; that is, the initials.

Q. They were the cars of this company, then?

A. Yes, sir.

Q. And they were not the cars of the refiners of Western Pennsylvania.

A. I wouldn't take them to be.

Q. They were the cars of this company?

A. Why certainly. They were marked that way anyway.

Q. Do you remember a Mr. Cone—Cone?

A. I do, yes, sir, Cohen.

Q. At all events, you remember a Mr. Cohen who was there?

A. Yes, sir.

Q. Did Mr. Cohen remain there as long as you did?

A. No, sir; he left there about eighteen months or two years before I did.

Q. Do you remember a Mr. Ruhl who was there?

A. Yes, sir.

Q. Did Mr. Ruhl stay there as long as you did?

A. I can't state about him, as his office was in New York City.

Q. Were those two gentlemen, to your knowledge, connected with this company, the United Refiners Export Oil Company?

A. Not to my knowledge. How is that?

403 Q. Were they connected with the United Refiners Export Oil Company?

A. Oh, yes; they represented it.

Q. What position did Mr. Cohen hold there?

A. He was General Manager.

Q. Up until about eighteen months or two years before you left?

A. Yes, sir.

Q. And you left when?

A. In 1898.

Q. Did Mr. Ruhl use to come up there?

A. Occasionally; perhaps once a month or so, when business was brisk.

Q. You were brought in contact with him, then, in a business way?

A. Yes, sir.

Q. Don't you know, as a matter of fact, that he ceased to come out there some time before you left there?

A. I don't know; he might have.

Q. Do you say that he continued to come out there as long as you remember?

A. I couldn't tell you about that.

Q. What is your recollection?

A. I don't recollect. The oil business suddenly ceased, and got less and less all the time.

Q. I am wanting you to say what your recollection is as to whether Mr. Ruhl continued to come out there as long as you remained?

A. I don't remember that.

Q. Who succeeded Mr. Cohen?

A. I don't know that, either.

Q. Well, wasn't there some one who was resident there?

A. Mr. Cohen was a resident there.

Q. Didn't some one take his place when he left?

A. No, sir; it was closed up entirely.

404 Q. They didn't do any business there any more?

A. They didn't do any business there after that.

Q. After Mr. Cohen, was nobody else there?

A. No, sir.

Q. Do you say that Mr. Cohen was the last person who was there in charge of that company's affairs?

A. Yes, sir.

Q. And the storage company entirely ceased then, did it, when he left?

A. Yes; the whole thing ceased then.

Q. Do you remember Mr. Ackerman?

A. No, sir.

Q. You didn't know Mr. Ackerman?

A. No, sir.

Q. Don't recollect him there?

A. No, sir.

Q. You don't remember that he came there along about 1892 or 1893?
A. No, sir.
Q. In connection with this company?
A. No, I don't.
Q. You don't remember that?
A. No, sir.
Q. I wish to ask you if the fact was not that cars were tied up there only periodically, and when a vessel was overdue?
A. No. They used to hold the cars there for a vessel to come in.
Q. Well, I ask you if that was a constant matter, or wasn't it only occasional and periodical when a vessel was overdue?
A. Well, it was constant.
Q. You can state, at least, whether that was a constant matter, or whether it was only occasionally?
A. Yes, sir.
Q. Well, which was it?
405 — A. It was constant.
Q. There were constantly freight cars on the track?
A. Yes, sir.
Q. For how long a period did that constantly occur?
A. Oh, well, from 1888 up until they closed.

By Mr. GOWAN: I wish to call attention, if the Court please, to a part of the evidence already in the case, as I understand it, to the statement of claim filed by the Penn Refining Company on which the Interstate Commerce Commission made its award, showing shipments to Perth Amboy, with a view of calling attention to the fact that all shipments so made were consigned to the United Refiners Export Oil Company.

Counsel for plaintiffs state, that this is not in evidence, as they understand it; to which counsel for defendants replied, that they would then offer in evidence the statement which is an exhibit in the case before the Interstate Commerce Commission, purporting to show shipments made by the Penn Refining Company, Limited, from Oil City to Perth Amboy, but decided to withdraw the offer, before they had stated the purpose thereof.

By Judge MEHARD: If this offer is withdrawn, they should also withdraw the testimony of the witness Johnson, which was based upon the exhibit; Mr. Johnson referred to the exhibit, and it must be considered in connection with his testimony. We will formally object to the testimony of Mr. Johnson relating to the exhibit that has been referred to, unless the exhibit is taken with the testimony upon which the testimony is based, and we therefore move the Court that all of the testimony of Mr. Johnson referring to this exhibit be stricken out, if the exhibit is not to be taken in connection with it.

By the COURT: We decline to strike out the testimony of this witness referring to the paper.

Counsel for defendants offer in evidence the testimony of Lewis

L. Walz, an employé of the plaintiff firm here, the Penn
406 Refining Company, as given before the Interstate Commerce Commission, and which is embodied in the printed copy of the evidence from pages 177 to 183.

No objection.

It was agreed by counsel for plaintiff and defendants that the following stipulation should be entered, to wit, that on February 11, 1892, a lease to the Philadelphia and Reading Railroad Company of all the railroads and property of the Lehigh Valley Railroad Company was made, and that, pursuant to said lease, the Philadelphia and Reading Railroad Company, entered into possession of the leased premises and operated the same until August 1, 1893; this stipulation being agreed to with the understanding that the lease referred to should be offered in evidence.

Whereupon counsel for plaintiff offered in evidence the lease referred to in the above stipulation, and the same is as follows:

Lease.

The Lehigh Valley Railroad Company to The Philadelphia and Reading Railroad Company

This Indenture made this eleventh (11th) day of February, A. D. one thousand eight hundred and ninety-two (1892), between the Lehigh Valley Railroad Company of the first part and the Philadelphia and Reading Railroad Company of the second part, witnesseth:

Whereas, the railroads of the companies aforesaid, parties hereto, are connected with each other by means of intervening railroads, and the said companies, in pursuance of the provisions of the Acts of Assembly in such case made and provided, and of every other power and authority them in that respect enabling, have agreed that the railroad of the said Lehigh Valley Railroad Company shall be leased to the Philadelphia and Reading Railroad Company, and shall be run, used and operated by the last named company upon the terms and conditions herein set forth.

407 Now this Indenture Witnesseth: That the party of the first part for and in consideration of the premises and of the rents reserved, and of the covenants and agreements on the part and behalf of the party of the second part, to be by it kept and performed as hereinafter contained, and of the sum of One Dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, doth hereby let and demise to the said party of the second part, its successors and assigns, the entire railroad of the party of the first part, from its southern terminus at Easton, in Northamption County, Pennsylvania, to its northern terminus in Wilkesbarre, Luzerne County, Pennsylvania, as the same is now located and constructed, or as the same may be hereafter located and constructed during the term of this demise, in pursuance of any and every lawful authority now existing, or which may hereafter exist, and also all the railroads, branches,

laterals, extensions, sidings, turnouts, tracks, bridges, viaducts, culverts, telegraph lines, posts and wires, rights of way, water rights and privileges, all lands, machinery, fixtures, depots, railroad stations, telegraph stations, water stations, houses, buildings, structures, improvements, appurtenances, tenements and hereditaments, of whatever kind or description and wherever situate, now held or owned by the party of the first part as belonging to and appurtenant to the said railroad as such or which heretofore have been or at any time hereafter, during the term of this demise, may be acquired by the party of the first part for some purpose incident to or connected with the maintenance, operation, construction or extension of the aforesaid railroad or its appurtenances. Also all the engines (stationary and locomotive) cars, tenders, trucks and all other rolling stock, tools, implements, machines, and personal property of every kind and description in use or intended or adapted for use in, upon or about the said railroad or the business thereof,
including all steamships, steamboats, tugs, floats, canal boats,
408 barges, and other vessels belonging to the party of the first part, or to any of the hereinafter mentioned corporations, owned, leased, or in any manner controlled by the party of the first part. Also all the rights, powers, franchises, (other than the franchise of being a corporation), and privileges which may now or at any time hereafter, during the term hereby demised, be lawfully exercised or enjoyed, in or about the use, management, maintenance, renewal, extension, alteration, or improvement of the demised premises, or any of them.

And the said party of the first part does hereby set over and assign to the party of the second part for and during the respective terms thereof all leases of railroads and other public works situate in the States of Pennsylvania, New Jersey and New York; also all trackage and operating agreements held by it or by any of the corporations owned, leased or controlled by it, and does hereby authorize and empower the said party of the second part to enforce the terms and covenants of said agreements and leases as against the other whatsoever parties thereto, and as against all other parties in the same manner and to the same extent as the party hereto of the first part might or could do had not this assignment been made; and for this purpose the party of the second part may use the name of the party of the first part and of the aforesaid respective corporations owned, leased or controlled by it in all courts and places and in all proceedings in that behalf; and the party of the second part hereby agrees to keep and perform all the obligations of the party of the first part and of the aforesaid respective corporations owned, leased, or controlled by it under said agreements and leases. A list or statement of the several leases and agreements above referred to is hereto annexed and made a part hereof.

There are expressly included in this lease the buildings of the
party of the first part situated at 226, 228 and 230 South
409 Third street, Philadelphia, and the office buildings belonging to the party of the first part, situated at *at* South Bethlehem, Pennsylvania, it being understood and agreed that in order

to provide accommodation for the transaction of the business of the parties of the first part and of all the companies owned, leased or controlled by it, the party of the second part shall and will provide and set apart in the City of Philadelphia and wherever else required by the said party of the first part, and in such localities as it may designate, such rooms or buildings as may in the judgment of the said party of the first part be reasonably required for such purpose.

To have and to hold the said demised premises unto the party of the second part, its successors and assigns, for the full term of nine hundred and ninety-nine (999) years from and including the first day of December, 1891; it being understood and agreed that the term "demised premises," wherever used herein, shall include all the railroads, public works, transportation lines and appurtenances hereinbefore let and demised, those which are transferred and delivered to the party of the second part under and by virtue of the foregoing assignment of agreements and leases and those owned or controlled by the party of the first part by virtue of ownership of the whole or a majority of capital stock, or otherwise howsoever.

And in consideration of the premises the parties hereto do hereby covenant and agree as follows; each party covenanting for itself, its successors and assigns, with the other, its successors and assigns.

First. That the party of the second part shall and will pay on the days hereinafter specified during the said term, to the party of the first part as rent for the said demised premises, the following sums of money:—

(A.) Such sums as will be equal to and will enable the party of the first part to pay and discharge all interest moneys, dividends, rentals, guarantees, and all other charges which it is now
410 obliged in any manner to pay upon its own preferred stock, its bonds, obligations, or floating debt, or upon the bonds, obligations, floating debt or stocks of other companies, or otherwise howsoever, a schedule whereof, approximately correct, is hereunto attached and made a part hereof. Payment of the said various sums is to be made fifteen days prior to the dates at which the said charges respectively become due and payable by the party of the first part.

Provided, and it is hereby expressly understood and agreed, that if a reduction or an increase in the rate of interest upon any of the outstanding obligations of the party of the first part shall at any time hereafter be made, whether by extension of the time of payment of the principal thereof, by a funding of the said floating debt, or by exchange of existing bonds for bonds bearing a less or greater rate of interest, or otherwise howsoever, or if any reduction or increase shall be made in the rental of leased roads or in any other charges, payable to the party of the first part, then the sums payable by the party of the second part as above mentioned shall be reduced or increased by an amount equal to the reduction or to the increase in the said interest, rentals or other charges.

And provided further, and it is hereby expressly understood and agreed, that if the party of the second part shall pay off and cancel, discharge or satisfy any principal sum, the interest of which is

payable as aforesaid as a part of the annual rental due by the party of the second part, for the said demised premises, the said annual rent payable by the party of the second part, shall thereafter be reduced by a sum equal to that theretofore annually payable as interest on such principal sum, including therein all taxes which, by the terms of the obligation, were payable in relief of the holder; but if the party of the second part shall prefer to purchase and shall purchase the stocks, bonds, certificates of loan, mortgages or other obligations by which such principal sum shall be evidenced or secured, or if unable to purchase, shall pay off the same and
411 then elect to succeed and be subrogated to all the rights and securities resulting therefrom or incident thereto before and at the time of said payment, the said party of the second part shall as to the said stocks, bonds, certificates of loan, mortgages, or other obligations, stand in the same position as any other holder of a like security, and the interest thereon shall be retainable from the sums due by the party of the second part as above stated.

(B.) Upon each of the dates, March 31st and June 30th, 1892, the sum of five hundred and four thousand one hundred and eighty-five dollars, the same being equal to one and one-quarter per cent. on the existing outstanding capital stock of the party of the first part.

(C.) Upon each of the dates September 30th and December 31st, 1892, the sum of six hundred and five thousand and twenty-two dollars, the same being equal to one and one-half per cent. on the existing outstanding capital stock of the party of the first part.

(D.) Upon March 31st, 1893, and upon the last days of every June, September, December, and March thereafter during the continuance of the term of this lease, a sum of seven hundred and five thousand eight hundred and fifty-nine dollars, the same being equal to one and three-fourths per cent. on the existing outstanding capital stock of the party of the first part.

(E.) Upon the first day of January, 1894, and upon the first day of every January thereafter during the term, an additional sum equal to fifty per cent. of the surplus net earnings, as hereinafter defined, which shall have accrued to the party of the second part during the twelve months of the fiscal year, ending the 30th day of November next preceeding, and if the accounts of the party of the second part cannot be made up by January 1st, so as to determine such sum accurately, then the same shall be determined as closely as may be done, and any error shall be adjusted, with inter-
412 est, as soon thereafter as the same can *can* be ascertained: Provided, however. And it is hereby expressly understood, agreed and covenanted, that the sum thus payable by the said party of the second part to the party of the first part, as and for its fifty per cent. of the surplus net earnings, shall not in any one year exceed a sum equal to three per cent. on the then existing outstanding capital stock of the party of the first part.

Provided, And it is hereby expressly understood and agreed that if at any time hereafter, the capital stock of the said party of the first part, shall be increased, under any provisions of this lease (but not otherwise) the sums payable as hereinbefore stated in para-

graphs (B), (C), (D) and (E), shall be increased by a sum equal to the amount of a dividend upon a like amount of the present existing capital stock of the party of the first part at the rates respectively above specified.

And provided further, and it is hereby further expressly understood, agreed and covenanted that the words "surplus net earnings" shall be held to signify the sum remaining of the total gross receipts, earnings and income of the said demised premises during each fiscal year ending November 30th, after deducting therefrom all such expenses of maintaining, operating, renewing, replacing and repairing the said demised premises as shall be necessary for the safe, proper and economical operation of the same, all taxes as set forth in Article Third hereof, all sums named in paragraphs (A) and (D) of Article First hereof, and all sums payable by the party of the first part and not properly chargeable to capital account.

Second. An adjustment of account shall be made between the parties hereto from the 1st day of December, 1891, to March 1st, 1892, and the balance found to be due from either party to the other shall be paid within ten days after ascertainment. All liabilities or charges and all revenues after December 1st, except expendi-
413 tures on capital account as hereinafter provided, shall be charged and credited respectively to the said party of the second part: Provided, however, that any interest, charge, tax, levy, or assessment, payable for any period beginning before the 1st day of December, 1891, shall be apportioned between the parties hereto so that the party of the second part shall be liable for or entitled to that portion only which shall have accrued after the said 1st day of December, 1891.

All liabilities heretofore incurred by or on behalf of the said party of the first part or by or on behalf of any of the companies leased, controlled or operated by it for or on account of which under existing contracts or agreements payments are now due or shall hereafter become due, which are or shall properly be the subject of charge to capital stock, may be liquidated by the issue of either bonds or stock of the party of the first part, or of bonds of the companies primarily liable therefore, at the election of the party of the first part, with such guarantee by the party of the first part as shall already have been provided for. And the said party of the second part hereby agrees that the interest upon such bonds and the dividends upon such stock, at the rates hereinbefore provided, shall be added to and included as a part of the rental payable hereunder.

Third. That the party of the second part shall and will punctually and faithfully pay all taxes, charges, levies, imposts, claims, liens and assessments of any and every kind which during the continuance of the term hereby demised shall, in pursuance of any lawful authority, be assessed or imposed on the demised premises or any part thereof or upon the business there carried on, or the receipts, gross or net, therefrom, or upon the capital stock or the franchises of the said party of the first part or any of the corporations owned, leased or in any manner controlled by the party of the first part, or upon the yearly payments herein agreed to be made to the party of the

first part, or upon the dividends declared and paid by the
414 party of the first part, or by such owned, leased or controlled corporations to its or their stockholders, for the payment or collection of which the said party of the first part or said owned, leased or controlled corporations would otherwise be liable or accountable under any lawful authority whatever; and also any taxes, charges, imposts or levies or assessments in respect to either the principal or interest of bonds or obligations of the party of the first part, or of such owned, leased or controlled corporations, which, in pursuance of any lawful authority, the party of the first part or such owned, leased or controlled corporations shall be required to pay without recourse to the parties to whom such interest is paid, whether such recourse shall not be allowed by the provisions of the statute, ordinance or enactment imposing or authorizing such tax, charge or assessment, or shall have been waived or released by any now existing or future agreement of the party of the first part in respect thereto.

And all other payments required to be made by the party of the first part or by such owned, leased or controlled corporations during the term of this indenture, and not herein otherwise specifically provided for and not properly chargeable to capital account, shall be assumed and charged by the party of the second part, as if the party of the second part were primarily liable for the same. The party of the second part shall defend all actions of every kind that may be depending or that may hereafter be brought against the party of the first part or against any of the corporations owned, leased, or controlled by it during the said term, and shall pay all amounts that shall or may be recovered against it or them, or any or either of them and shall also indemnify and save harmless the party of the first part of and from all causes of action, legal and equitable, and claims and demands that have arisen, or shall or may arise against it or which shall or may arise against the said party of the
415 second part in the exercise of its powers under this lease and during the continuance thereof, and all payments so made by the party of the second part shall be charged as a part of its operating expenses hereunder in the computation of surplus net earnings. *Excepting however,* out of the operation of this provision the liability as it shall hereafter be determined upon the hearing of the appeal of the Lehigh Valley Railroad Company, as alleged to exist in a certain pending action taken in the Court of Common Pleas of Dauphin County, and entitled the Commonwealth of Pennsylvania *vs.* The Lehigh Valley Railroad Company, No. 88 of June Term, 1889, and as to the amount, if any, which The Lehigh Valley Railroad Company may hereafter be called upon to pay by reason of the final determination of the said action, the said party of the first part may, in order to provide money to pay the amount, issue bonds or stocks, and when such bonds or stock shall have been issued, the annual rental herein provided to be paid shall be increased annually by the amount of the interest upon the said bonds or by the amount of the dividend upon the said stock: Provided, That the

party of the first part shall, from time to time, and at all times give due notice to the party of the second part of any claim or suit brought against the said party of the first part, or against any corporation owned, leased, or in any manner controlled by it, by which the party of the second part may be involved in any liability whatever, and it shall be the duty of the party of the second part to make in the name and on behalf of the party of the first part, but at the cost and expense of the party of the second part, any legal or equitable defense that can be made to such claim or suit.

And the party of the second part shall and will assume and fulfil all obligations and liabilities to which the party of the first part or the companies owned, controlled or operated by it may be
416 subject under any and all existing contracts or agreements between it, them or any of them and any other persons or corporations.

Fourth. The party of the second part shall also pay to the party of the first part, commencing with the 1st day of July, 1892, the yearly sum of twenty-five thousand dollars, lawful money of the United States, in equal monthly payments of two thousand and eighty-three dollars and thirty-three cents on the twenty-fifth day of each month, for the purpose of defraying the expenses of maintaining the corporate organization of the party of the first part, and which said sum is to be appropriated to that purpose only. And up to the said 1st day of July, 1892, the party of the second part shall be liable for and pay all such organization and office expenses from and after December 1st, 1891, as the party of the first part shall deem necessary for the closing up of its business, not exceeding, however, the present rate of expenditure on account thereof. All such payments made under this section shall be charged as a part of the operating expenses of the party of the second part in computing the surplus net earnings hereinunder.

Provided, however, And it is hereby expressly understood and agreed, that in any year or years the rental paid by the said party of the second part, which shall be applicable to dividends shall be sufficient to pay an annual dividend upon the stock of the said party of the first part, exceeding seven per centum by twenty-five thousand dollars, no payment of the said sum of twenty-five thousand dollars shall be required to be made by the said party of the second part for such year or years.

Fifth. That the said party of the second part shall and will during the continuance of the hereby demised term, keep and maintain the said demised premises in good order and repair; keep in public use, manage and efficiently operate the same, and from time to time, and at all times, indemnify and save harmless the said party of the first part from all liabilities, damages, claims and suits by rea-
417 son of anything done or omitted by the party of the second part in the premises, and at the expiration or other determination of the hereby demised term, surrender the said demised premises in the same good order and condition as they now are. It being understood and agreed, however, that the party of the second part shall and will keep up, and maintain during the term hereby

created a line of insurance not less than the amount now in force upon the demised premises, or any part or parts thereof, including the water craft hereby as aforesaid demised, and that all policies of insurance now held by the party of the first part on any building or structure hereby demised or on the contents of such structure or upon freight received for transportation or in transit or upon water craft shall be assigned to the party of the second part, and all sums received under any policies on buildings or structures thereunder shall, at the option of the party of the second part, be either appropriated to restoring or replacing the buildings or structures covered by such policies, or to the discharge, by purchase or payment of any bond or obligation secured by any existing mortgage upon the demised premises, in which latter case the annual rental payable by the party of the second part to the party of the first part shall be decreased by an amount equal to the annual interest upon the said discharged bond or obligation.

Sixth. That the party of the second part shall and will, during the continuance of the hereby demised term, provide and maintain, and from time to time cause to be provided, as the same may be required, adequate station and terminal facilities, for the receipt, shipment and handling of all traffic over the lines of the said party of the first part, and it shall and will keep and maintain in use on the railroads and transportation lines hereby demised an adequate equipment of rolling stock, vessels, tugs, barges, floats, canal boats and other equipment and personal property adapted for
418 railroad and water transportation, and at all times sufficient for the growth of the business of the lines of the party of the first part, and of a character and type equal in all respects to that then in general use upon first-class rail, canal and water lines, replacing from time to time all such as may be worn out, wrecked or destroyed All such equipment, including that supplied to take the place of any worn out, wrecked or destroyed, shall be marked in the ordinary and customary way as the property of the party of the first part. An inventory of the said rolling stock, vessels, tugs, barges, floats, canal boats and other equipment adapted for railroad and water transportation herein demised, shall be forthwith made, and the same shall be appraised at their fair market value by three appraisers, one to be selected by each of the parties hereto and the third by the two thus selected, and the said inventory and appraisement shall be attested by the signatures of the said appraisers, and be considered part of this agreement; and upon the expiration or sooner determination of the term of this lease, the party of the first part shall be put in possession of all the rolling stock, vessels, tugs, barges, floats, canal boats and other equipment and personal property then in use upon the said lines, and which shall be of at least of the value, tonnage, capacity and efficiency of that hereby leased to the party of the second part.

Seventh. That the party of the second part shall not and will not divert of permit or cause to be diverted from the transportation lines or terminals comprising the system of the party of the first part, its present traffic, or any traffic which would naturally go to or toward

its destination by or over the said system or any part thereof; and covenants and agrees that the tonnage mileage of all classes of traffic over the rail and water lines of the party of the first part shall be fostered and increased (by affording proper facilities and making of reasonable and proper charges for transportation, and otherwise) in such natural and proper future growth as shall be due to the
419 location and resources of the system of the party of the first part. And the said party of the second part shall at all times and from time to time during the term, give and extend to the individual operators and miners of coal along the lines of the party of the first part all due facilities for the shipping and marketing of the coal mined by the said operators and miners over the Lehigh Valley system and its terminals, and the said part- shall not do anything in discrimination against the said operators and miners.

The term "traffic" wherever used in this agreement is to be held as embracing passenger, freight, coal, mail, express, and all kinds of rail and water traffic.

Eighth. That the party of the second part shall and will divide and apportion the rates on all traffic which shall pass over the lines of the said party of the first part, and over lines owned, leased or controlled by the said party of the second part, between the several parties over whose lines the said traffic shall have passed, as follows: From the aggregate charge there shall first be deducted all arbitraries and terminal charges, and the balance shall be divided *pro rata* among the parties transporting the same in the proportion of the actual mileage over which the traffic has been transported by each. Provided, however, That the arbitraries and terminal charges thus to be deducted shall be such reasonable and customary allowances as are or may be charged by other railroad companies at the same localities, and shall not, at localities, similarly situated, exceed such reasonable allowances: Provided, however, That so far as the existing divisions are fairly consistent under all the circumstances with the foregoing *has is* for division of rates and the same shall be maintained, provided that the division of the rates on anthracite coal shall be reconsidered: And provided, further, that their lines and terminal facilities belonging to the system of the party of the first part are used, reasonable and customary allowances as
420 aforesaid shall be made and reckoned hereunder as gross receipts due the system of the party of the first part.

Ninth. And the party of the second part shall, during the term hereby devised, furnish such officers and employés of the party of the first part as shall be designated by the president thereof with annual passes or tickets entitling them to free passage in the passenger trains of the party of the second part.

Tenth. Separate, true, full and accurate books, of account shall be kept by the party of the second part of all the operations and business done by the party of the second part under the terms of this indenture, which books of account and the date upon which the same are based shall at all times be open to the inspection and examination of the officers of the party of the first part, and of such other person or persons as the said party of the first — shall from

time to time, appoint to examine the same, with the right, privilege and liberty at any and all times to make copies or extracts from the same for the information of the officers and directors of the party of the first part. And said party of the second part shall furnish to the party of the first part on the twenty-fifth of each month during the continuance of this indenture a statement showing the operations and business done hereunder.

Eleventh. And the said party of the second part shall from time to time, and at all times, save harmless and indemnify the party of the first part from and against all loss or damage resulting from or occasioned by any failure or neglect of the party of the second part to comply with the covenants, stipulations and conditions herein contained on the part of the party of the second part to be kept and performed, or from any failure of the party of the second part to do what ever it may lawfully be required to do in the use, management and control of the demised premises.

Twelfth. That the said party of the second part, its successors and assigns, keeping and performing the covenants herein con-
421 tained on its and their part to be kept and performed, shall and may at all times, and from time to time, peaceable and quietly have, hold, use, and enjoy the demised premises and every part and parcel thereof with the appurtenances, without any manner of let, suit, trouble or hindrance from the party of the first part, its successors and assigns; and the said party of the first part shall and will at any time hereafter execute and deliver at the expense of the party of the second part such further assurances as may reasonably be required for fully effectuating the objects and purposes of this indenture, and the more fully securing unto the party of the second part all the estates, rights, and privileges hereinbefore mentioned and granted, or intended so to be.

Thirteenth. That the party of the first part shall and will maintain its corporate existence and organization, and shall and will from time to time, and at all times, when requested, by the party of the second part, its successors or assigns, put in force and exercise, or caused to be put in force and exercised, each and every corporate power, and each and every corporate act, which the party of the first part or any corporation or corporations at the time controlled by it might now, or at any time hereafter, lawfully put in force and exercise, to enable the party of the second part, its successors or assigns, to enjoy and exercise every right, franchise and privilege, which may lawfully be enjoyed or exercised in respect to the use, maintenance, management, renewal, extension, alteration, or improvement on the said demised premises, or the business to be there carried on; the party of the second part agreeing to indemnify and save harmless the party of the first part against all expense, loss, damage, or liability resulting from or occasioned by any exercise of corporate powers, or performance of corporate acts, by the party of the first part, or by corporations owned, leased or controlled by it, when exercised or performed at the request of the party of the second part.

422 Fourteenth. That if the party of the second part shall during the term hereby created, with the consent of the party

of the first part, which is not to be unreasonably withheld, make any additions, extensions, betterments, or improvements to, of or upon the said demised premises, or if the said party of the second part shall pay off any obligation of the party of the first part, which the party of the first part hereby consents may be done, then the said party of the first part shall upon request of the party of the second part and to the extent of the lawful power of the said party of the first part in the premises, raise such money by the issue and sale of stock or bonds, or if the party of the first part shall so elect, issue to the said party of the second part, either an amount of bonds, bearing interest at a rate not exceeding six per centum per annum, or shares of the capital stock of the party of the first part equal at par to the cost of such additions, extensions, or improvements or the amount of such payments; it being understood and agreed, however, that in all cases of an issue of bonds or stock by the party of the first part for any purpose contemplated or mentioned in and by this agreement by the party of the second part shall have the prior right, at the option, to purchase the same at the proposed selling price thereof.

Fifteenth. That this lease shall not be sold, mortgaged, or assigned, and the demised premises, or any part thereof shall not be sublet, without the consent of the party of the first part given in writing under its corporate seal. And no purchaser at any judicial sale, nor assignee, receiver, nor mortgagee of the party of the second part, nor any assignee of the party of the second part appointed under proceedings in bankruptcy, or becoming so by virtue of any act or operation of law in any proceeding against it at law or in equity, shall have any title to or interest in the said premises hereby demised, or any part thereof without the consent of the party of
423 the first part given as aforesaid in writing under its corporate seal.

Sixteenth. That if the party of the second part shall make default in the payment of the rent hereby reserved, or of any of the payments herein covenanted to be made by it for a period of thirty days after the same shall have become due, or in case of any breach of covenants on the part of the party of the second part, and thirty days' notice thereof given by the party of the first part to the party of the second part if the same cannot or shall not be fully compensated within such period of thirty days, then it shall be lawful for the party of the first part, at its option, to declare this lease at an end and the agreement herein contained to be rescinded, and may thereupon re-enter and repossess the whole of the demised premises as of its first and former estate, and may resume, take and enjoy all, the rights, privileges and franchises as if this agreement had not been made, and notice of the exercise of such option and of any intention to re-enter upon and repossess itself of said demised premises shall operate as a reassignment of the agreements and leases assigned in and by this lease, but the exercise of such option and such reentry, repossession and reassignment shall not relieve the party of the second part from liability to the party of the first part, its successors and assigns, for all arrears of rent due and unpaid at the time, and for all damages resulting from the breaches of covenants by the party

of the second part; and the party of the second part hereby covenants and agrees that it will forthwith, after notice of the exercise of such option on the part of the party of the first part, deliver over to the said party of the first part all the property and rights then held by said party of the second part under this lease, and will, on request, immediately execute and deliver to said party of the first part all agreements, deeds and transfers that may be necessary or proper to reinvest said party of the first part with all said demised
424 premises, and all said assignments, leases and contracts as fully as they were held by the party of the first part at the time this lease was made, saving and excepting the personal property purchased and paid for by the party of the second part under this agreement, which shall in such case remain the property of the party of the second part.

Seventeenth. It is understood and agreed, and is of the essence of this contract, that if a certain agreement of even date herewith, between the Lehigh Valley Coal Company and the Philadelphia and Reading Coal and Iron Company shall be terminated for any reason whatsoever, then this lease shall, at the option of the party of the first part, be also at once terminated and ended, and such termination shall operate as a reassignments of all agreements and leases assigned in and by this lease.

Eighteenth. It is further covenanted and agreed that in the event of the party of the first part resuming possession of the demised premises as hereinbefore provided, the party of the second part shall make good to the party of the first part any depreciation or deterioration in the then aggregate value of the demised premises as compared with their present value, saving to such extent as the depreciation shall not have resulted from any default of said party of the second part, and shall immediately deliver to the party of the first part personal property of the same character as and of equal value to that hereby transferred to the party of the second part, or, in default thereof, shall pay to the party of the first part a full equivalent therefor in cash.

Nineteenth. The party of the first part hereby agrees to sell, assign, transfer and set over unto the party of the second part all its railroad material and telegraph material, such as rails, iron, ties, timber, lumber, coal and other fuel, oil, materials in repair shops and in unfinished rolling stock, telegraph poles, wire and all other articles generally known as railroad and telegraph supplies, which on the day of the date of these presents, shall be stored or reserved
425 for use or consumption, and shall not then be in actual use for railroad and telegraph purposes, or shall not have been issued for that purpose. The party of the second part agrees to pay for the personal property aforesaid a sum to be determined by three appraisers to be forthwith chosen, or by a majority of them, one of whom shall be chosen by each of the parties hereto, and the two thus chosen shall chose a third. The said appraisement shall be made as soon as possible, and the party of the second part shall pay to the party of the first part the amount fixed by the said appraisers

as the said supplies are issued for use. The expense of said appraisement is to be equally borne by the parties hereto.

Twentieth. The party of the second part shall and will, during the continuance of the hereby demised term, keep and maintain the present car shops, repair shops and works and plant of similar character, of every description, including all tools, machinery, fixtures and appliances of any kind whatsoever therein and thereabout, in the condition the same now are, and for the better securing to the party of the first part the full performance of this covenant an inventory of the said tools, machinery, fixtures and appliances shall be forthwith made, together with all tools and appliances used on or about the said railroad and canal and water transportation lines, and the same shall be appraised at their fair market value by three appraisers one to be selected by each of the parties hereto, and the third by the two thus selected, and the said inventory and appraisement shall be attested by the signatures of the said appraisers and be considered part of this agreement; and that upon the expiration or sooner determination of the term of this lease, the party of the first part shall be put in possession of personal property of similar character and of value equal to that herein leased to the party of the second part.

426 Twenty-first. It is understood and agreed that all stocks of its controlled corporations, and all bonds and other securities owned by the Lehigh Valley Railroad Company, shall remain the property of the party of the first part; the party of the first part, hereby expressly covenanting, upon the request of the party of the second part, to execute and deliver, from time to time, all such powers of attorney in relation to such stocks, bonds or other securities as may be necessary to enable the said party of the second part to collect the interest or dividends to accrue thereon during the term of this lease, such interest and dividends to be reckoned as part of the gross receipts, earnings and income of the said demised premises, and to be taken into account in the determination of the surplus net earnings thereof.

The party of the first part shall not without the consent of the party of the second part, sell and dispose of any of the aforesaid stocks, but this limitation shall not extend to the sale of bonds or other securities; *Provided, however,* That in the event of a sale by the said party of the first part of any of the said stocks, bonds or securities, the proceeds thereof shall be appropriated by it to the payment or retirement by purchase or otherwise of any of the bonds or obligations of the said party of the first part, or of any corporation owned, leased or controlled by it, (which bonds shall thereupon be cancelled), and thereafter the annual rental payable by the party of the second part to the party of the first part, shall be decreased by an amount equal to the annual interest payable upon the bond so cancelled, or at the option of the party of the first part, such surplus may be applied to the improvement of the demised premises or in the purchase of other property, real or personal.

Twenty-second. That the said party of the first part may at any time hereafter, with the consent of the party of the second part,

which shall be evidenced by its becoming a party to the conveyance, sell and convey the whole or any part of the real estate hereby
427 demised, which shall, in the opinion of the said parties be necessary for the purpose of carrying on business over the demised premises, provided that the proceeds of any such sale shall be applied first to the payment of any incumbrances upon the property so sold, for the payment of which the said party of the first part may be liable, and the surplus, if any, shall be applied, as provided in article twenty-first hereof as to the disposition of the proceeds of sale of stocks, bonds or securities sold by the party of the first part.

In Witness Whereof. The said parties hereto have caused their respective corporate seals, duly attested, to be hereunto affixed, the day and year first above written.

[Seal L. V. R. R. Co.]

LEHIGH VALLEY RAILROAD COMPANY,
By E. P. WILBUR, *President.*

Attest:
JOHN R. FANSHAWE, *Secretary.*

[Seal P. & R. R. Co.]

THE PHILADELPHIA AND READING RAILROAD COMPANY,
By A. A. McLEOD, *President.*

Attest:
W. R. TAYLOR, *Secretary.*

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*
vs.

On the eleventh day of February, A. D. 1892, before me, the subscriber, a Notary Public, duly commissioned to take acknowledgments of deeds, &c., in and for the said Commonwealth, and residing in said city, personally came John R. Fanshawe, secretary of the within named corporation, the Lehigh Valley Railroad Company, who, being duly sworn according to law, deposes and says that he was personally present at the execution of the above written indenture and saw the common or corporate seal of the said Lehigh
428 Valley Railroad Company duly affixed thereto, and that the seal so affixed thereto is the common or corporate seal of the said corporation; and that the above or within indenture was duly signed, sealed and delivered by and for the act and deed of the said corporation for the uses and purposes therein mentioned, and by order and authority of the board of directors of the said corporation; and that the names of E. P. Wilber, president of the said corporation, and of this deponent, subscribed to said deed, in attestation of the due execution and delivery thereof, are in the proper and respective handwritings of said E. P. Wilbur and of this deponent.

JOHN R. FANSHAWE.

Sworn — and subscribed before me the day and year last above written.

Witness my hand and notarial seal.

[NOTARIAL SEAL.] THOMAS L. J. HODGE,
Notary Public.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

On the eleventh day of February, A. D. 1902, before me the subscriber, a notary public duly commissioned to take acknowledgements of deeds, &c., in and for said Commonwealth, and residing in said city, personally came W. R. Taylor, secretary of the within named corporation, the Philadelphia and Reading Railroad Company, who, being duly sworn according to law, deposes and says that he was personally present at the execution of the above written indenture, and saw the common or corporate seal of the said Philadelphia and Reading Railroad Company duly affixed thereto, and that the seal so affixed thereto is the common or corporate seal of the said corporation, and that the above or within indenture was duly signed, sealed and delivered by and as and for the act and deed of the said corporation, for the uses and purposes therein
429 mentioned, and by order and authority of the board of directors of the said corporation; and that the names of A. A. McLeod, president of said corporation, and of this deponent, subscribed to said deed in attestation of the due execution and delivery thereof, are in the proper and respective handwritings of said A. A. McLeod and of this deponent.

W. R. TAYLOR.

Sworn and subscribed before me the day and year last above written.

Witness my hand and notarial seal.

[NOTARIAL SEAL.] C. X. CLINK,
Notary Public.

(Mr. Gowan, of counsel for defendant, offers in evidence the testimony of S. Y. Ramage, beginning on page 23 of the printed copy of the testimony taken before the Interstate Commerce Commission and extending to page 52; and upon his attention being called by counsel for plaintiff to the fact that his offer does not include all of the testimony of the said witness (Ramage) appearing in said printed copy of testimony, stated that he would offer all of the testimony of said Ramage contained in the printed copy of the testimony referred to.)

(Counsel for defendants ask leave to amend the answers filed in the above entitled case by adding the following averment, to-wit: That the action claimed in this case has not arisen within the period fixed by the Statute of Limitations of the State of Pennsylvania.)

(Counsel for plaintiff object to the offer to amend, on the ground that the Act of Congress under which this proceeding is brought requires that the defendants shall file their answer within ten days

after the service of a copy of the plaintiff's petition; that the issue is formed when the answer is filed, and that it is too late to amend the answer after the expiration of that time and after the case has been called for trial, the jury sworn and the cause proceeded with.)

430 By the COURT: We will overrule the objection and permit the amendment, and note an exception to the plaintiff.

E. T. JOHNSON recalled.

E. T. JOHNSON, recalled, for further cross-examination.

Cross-examination by Judge MEHARD:

Q. You referred to a paper in your testimony in chief, or in your direct testimony, as being a paper which referred to shipments of the Penn Refining Company, Limited, over your line. I ask you if this is the paper which I show you?

A. I think it is; that is, shipments on which they claim overcharge.

Q. I ask you what that paper shows on its face as to overcharge?

A. It shows an amount claimed of $8.40 per car.

Q. For how many cars?

Objected to by counsel for the defendants, as not cross-examination, the witness having been simply asked to show the dates of the items; what the date of the last shipment was in that paper.

Judge MEHARD: The paper itself is the best evidence of that, and we object to the testimony of the witness unless the paper is given in connection with his testimony.

By the COURT: We will permit you in rebuttal to make an offer of this paper with the same force as though you were permitted to do so here on cross-examination.

Judge MEHARD: We would like to be put on record as objecting to the testimony of the witness with reference to the paper about which he testified, unless the paper itself be given in evidence in connection with his testimony.

By the COURT: The ruling we have made in declining to strike out the testimony of the witness, which was given without

431 objection, is made without prejudice to the right of the plaintiff to offer the paper in evidence, if they see fit to do so, in rebuttal.

Judge MEHARD: Does your honor mean that we can do that as under cross-examination?

By the COURT: We will determine that when we come to it.

Defendants rest.

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REBUTTAL TESTIMONY.

Testimony of Lewis Walz.

LEWIS WALZ, a witness called by plaintiff in rebuttal, being duly, sworn, testified as follows:

Direct examination by Judge MEHARD:

Q. Where do you live?
A. In Oil City.
Q. Are you connected with the Penn Refining Company?
A. Yes, sir.
Q. In what capacity?
A. As Manager.
Q. Were you connected with the Penn Refining Company in 1888?
A. Yes, sir.
Q. And in 1887?
A. Yes, sir.
Q. And prior to that time?
A. 1886.
Q. I wish you would state to the Court and jury whether there was a through rate from your district of country—that is, the neighborhood of Oil City, through to Perth Amboy, by way of the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad, prior to 1887?
A. Yes, sir.
432 Q. Since what time do you know of such a through rate?
A. 1886.
Q. From the time you became connected with the company?
A. Yes, sir.
Q. I wish to ask you further, whether you ceased shipping at some time your oil by way of this route made up of the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad?

(Mr. Patterson, of counsel for defense, asks the purpose.)

By Judge MEHARD: I am wishing to prove by the witness that the reason he stopped shipping by that route was not the one assigned by the witness, Mr. Johnson.

By Mr. PATTERSON: Mr. Johnson didn't assign any reason. He stated simply what they had heard.

By Judge MEHARD: If that is not in evidence, we do not wish to dispute it. He said that the reason they stopped shipping was because of the establishing of a pipe line, and we wish to show that that was not the reason.

A. Yes, sir.
Q. Mr. Johnson has stated in his testimony that the reason they stopped shipping was because, or he heard it was because of the establishment of a pipe line. I wish you would state to the Court

and jury, whether that was the reason, or if there was some other reason, and, if so, what it was?

A. That was not the reason, because we were building a pipe line. It was for the reason that the rumor was out then that the Standard Oil Company was connecting themselves with the United Refiners' Export Oil Company, and we found, further more, that they didn't take as much oil as we were formerly shipping them; they wouldn't move it away. And that's the reason.

433 Cross-examination by Mr. GOWAN:

Q. When did that rumor to which you refer get about?

A. I think it was in 1893 or 1894: I wouldn't just exactly state, but it was along thereabouts.

Q. And before that time, the United Refiners' Export Oil Company had not been controlled by the Standard Company?

A. Not by my knowledge.

Q. Don't know it was not?

A. I don't know positively.

Q. Don't know it was not?

A. I don't, positively.

Q. You don't know that was controlled by the Independent Refiners?

A. By the Independent refiners?

Q. Yes, sir.

A. The United Refiners Export Oil Company?

Q. Yes.

A. No, sir; not to my knowledge.

Q. What do you mean by not to your knowledge? What information had you about it?

A. I had information enough, because we had been shipping to those people for at least four or five years, and they had been buying our oil outright; paid us so much money for it, and that was the end.

Q. During all this period of time that you have referred to you were in competition, were you, with the Standard Oil Company?

A. Yes, sir.

Q. And during all that period of time, you sold all of your oil that you shipped to Perth Amboy to the United Refiners Export Oil Company?

A. No, sir.

Q. You did not?

A. No, sir.

434 Q. You say you did not?

A. Not all of it; not all our oil.

Q. Which you shipped through Perth Amboy?

A. Shipped to Perth Amboy, yes, sir.

Q. You didn't sell all?

A. We didn't ship all.

Q. I don't understand that answer?

A. We shipped only the export oil, that was marketed in foreign markets—we shipped that oil to the greatest extent to those people;

there was some oil that we made for export also which we shipped to other plants.

Q. I asked you whether all the export oil that you shipped through Perth Amboy was not sold by you to the United Refiners Export Oil Company?

A. Yes, sir.

Q. And you think—you are sure, though—that that company was not controlled by the Standard Company during all those years?

A. Yes, sir.

Q. Are you sure, or are you not—that it was not so controlled?

A. I think, I feel quite sure that they were not controlled by the Standard Oil Company until a later date.

By Judge MEHARD:

Q. When it is spoken of as the United Refiners Export Oil Company—did you or the companies with which you were associated in Western Pennsylvania, have any ownership or control in that company?

A. No, sir.

By Mr. GOWEN:

Q. When did the shipments of export oil by pipe lines commence?

A. I think it was in the year 1893, in the fall.

Q. Don't you know that all export oil is now shipped by pipe and not by railroad?

A. Practically so; all we are making.

435 Q. Hasn't that condition continued since 1893?

A. Practically so.

Court here adjourned until Thursday, May 22, 1902, at 9:20 A. M.

Thursday, May 22, 1902, court called at 9:30 A. M. and the trial of this cause was resumed.

LEWIS WALZ recalled.

LEWIS WALZ on the stand.

Cross-examination continued by Mr. GOWEN:

Q. Of which, of the associations which were parties to the proceedings before the Interstate Commerce Commission were you a member, or was the Penn Refining Company, Limited, a member?

A. The Oil City.

Q. The Oil City association?

A. Yes, sir.

Q. You know, do you not, that all the members of that association shipped to this United Refiners' Export Oil Company at Perth Amboy, for export oil?

A. Yes, sir.

Q. How about the other association, the Titusville association—they did the same, didn't they?

A. Yes, sir.

Q. You sold your oil, didn't you, to the United Refiners' Export Oil Company?

A. Yes, sir.

Q. How was it sold?

A. We sold it to them right out and out, allowing them a commission; they charged us a commission charge and yard charges.

Q. Yard charges and commission charges?

A. Yes, sir.

436 Q. You knew that they exported oil solely in barrels, did you not?

A. Yes, sir.

Q. Are you still in business?

A. Yes, sir.

Q. Under the name of the Penn Refining Company?

A. Yes, sir.

Q. And are still shipping oil?

A. Yes, sir.

Q. You are familiar with the rates you pay on oil that you ship, are you?

A. Yes, sir.

Q. Are you paying to-day, or have you at any time paid for shipments of oil in barrels on weights which did not include the weight of the barrel package? I ask you, now, to any point.

A. Not since 1887 or 1888, I think.

Redirect examination by Judge MEHARD:

Q. I omitted to ask you yesterday when you were on the stand whether you at any time requested Mr. Johnson to fix a through rate to Perth Amboy?

A. No, sir.

Q. Did you ever have any conversation with him on the subject of his fixing through rates?

A. No, sir.

By Mr. GOWEN:

Q. Well, whether you had or not, you did make use of the rate to ship to Perth Amboy all your export oil?

A. Yes, sir.

By Judge MEHARD:

Q. There is one other question: You were asked yesterday about shipping export oil in barrels. Is there any other kind of oil which you ship in barrels to the seaboard besides export oil?

A. Yes, sir.

437 Q. Have those shipments been continuing since 1892 or 1893?

A. Yes, sir.

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Q. You wanted to make some correction in your testimony. What was that?

A. Yes; I would like to make a correction in my testimony of yesterday.

By the COURT: Well, just state what you stated yesterday and what you want to correct.

A. The question was why we ceased shipping to the United Refiners Export Oil Company and at what time. And I wish to correct my statement to read 1891 and '92.

By Judge MEHARD:

Q. That was the time you ceased shipping?

A. Yes, sir.

By Mr. GOWEN:

Q. Then, if you have presented any claim to the Interstate Commerce Commission in which you included shipments after 1892 made to the United Refiners Export Oil Company, that was a mistake?

A. We included all the shipments we made——

Q. Just answer my question and make an explanation afterwards.

(Question read.)

A. It is possible that we have sent a few stray cars, but we were not under any new contract or making big shipments.

Q. You don't mean to be understood that your shipments to the United Refiners Export Oil Company ceased in 1892 absolutely?

A. No, sir.

Q. But you think the volume of shipments fell off after that date?

A. The record will show that.

Q. No; I am asking you for your recollection?

A. We haven't shipped anything after 1892.

438 Q. No shipments at all?

A. Not to the United Refiners Export Oil Company.

Q. And if any claim was presented to the Interstate Commerce Commission for shipments made after 1892 by the Penn Refining Company to the United Refiners Export Oil Company, that was a mistake, and you now desire to withdraw it?

A. If it was an export or foreign shipment——

Q. That is not my question. I asked shipments to the United Refiners Export Oil Company—shipments to that concern, no matter for what account. You say these shipments ceased in 1892?

A. Yes, sir.

Q. Then we are to understand your claim is withdrawn to the extent of——

A. Yes, sir.

By Judge MEHARD: There is no withdrawal of any claim, because there was no such claim presented.

By Mr. GOWEN: I say, if there was.

CLOSE IN CENTER

By Judge MEHARD: We don't want any ifs or ands about it. It is confusing the witness; you leave the impression upon the minds of the Court and jury that any claim that was presented he is withdrawing. He is withdrawing nothing. He should not be asked that in that way, so as to imply that it is possibly true.

By the COURT: I think that it is an assumption that there was a claim. The answer may be stricken out.

By Mr. GOWAN:

Q. In what period in 1892 did the shipments to the United Refining Export Oil Company cease?

A. I am not quite positive, but I think it was in the spring, either in the fall of 1891 or in the spring of 1892.

Q. Have you nothing — which you can refer with you, in order to ascertain?

A. Nothing except what we have here, our statements. I couldn't remember without that.

439 By Judge MEHARD:

Q. You mean the record?

A. Yes, sir.

By Mr. GOWEN:

Q. You testified, in answer to a question Judge Mehard asked you a few moments ago, that barrel shipments of oil to New York harbor points continued after 1893—that your barrel shipments of oil to New York harbor points continued after 1893.

A. Yes, sir.

Q. Did you intend to be understood as meaning that your barrel shipments of export oil continued after 1893?

A. No, sir.

Q. So that no shipments of oil as to which this controversy before the Interstate Commerce Commission was started—which was export oil alone—continued after 1893 in barrels.

Objected to by counsel for the plaintiff, First, because the witness is incompetent to state when the controversy started, its scope or comprehension; that can be shown by the record alone; Second, because the question assumes facts which have not been testified to by any witness.

Objection sustained, to the form of the question, and an exception to defendants.

Q. After 1893, did your firm ship any export oil by barrel?

A. I don't think we have.

Q. By tank cars?

A. Yes, sir.

Q. To what points?

A. New York harbor points.

Q. To what points in New York harbor?

A. Constable Hook.

Q. Then, we are to take it as a fact, are we not, that after 1893

your company made no shipments of export oil, either in barrels or tanks, to Perth Amboy?

440 A. Not to my knowledge.

Q. You know of none having been made?

A. No, sir.

Q. And in 1893, I understand you to say, the shipments of export oil by pipe line began by the independent refiners?

A. Yes, sir.

Q. And since that time has not practically all export oil been shipped by pipe line by refiners? I say practically all.

A. Practically all; yes, sir.

By Judge MEHARD:

Q. There is a question I neglected to ask you. Do you know whether your company was ever charged demurrage by the railroad company for cars blocking the yards at Perth Amboy?

(Objected to by counsel for defendants, as not rebuttal.)

By Judge MEHARD: My recollection is that Mr. Walker testified that there was a blocking of the yards at Perth Amboy, and we desire to show that there was not.

By the COURT: Mr. Walker testified that there was a blocking of the yards, and that they threatened to charge demurrage. That is my recollection of his testimony, and this is not rebuttal.

441 *Testimony of H. P. Berwald.*

H. P. BERWALD, a witness called by plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct examination by Judge MEHARD:

Q. Were you ever engaged in the oil refining business in 1888 and prior thereto?

A. Yes, sir.

Q. When did you first become connected in the oil refining business?

A. In the fall of 1885.

Q. Were you a member of the Independent Refiners' Association?

A. Yes, sir.

Q. With what company were you connected?

A. The International Oil Works, Limited, of Titusville, Pennsylvania.

Q. And your company was a member of the Independent Refiners' Association of Titusville?

A. Yes, sir.

Q. I wish you would state whether you had any knowledge of any application being made to Mr. Johnson, the agent of the Western New York & Pennsylvania Railroad Company to fix the through rate of freight to Perth Amboy?

A. I had no knowledge of that.

Q. Have you any knowledge of cars in which oil was shipped by

the Independent Refiners' Association being allowed to stand in the yard at Perth Amboy and blocking the tracks?

A. I have no knowledge of that.

Q. What knowledge have you upon that subject?

A. My observation lead me to believe——

(Objected to by counsel for defendants, unless the witness shows that he was in position to observe and knows the facts.)

442 Q. You were there noticing the shipments, back and forward, of cars, I believe?

A. I was; yes, at Titusville.

Q. And what knowledge have you now as to whether the cars were allowed to stay in the yards at Perth Amboy and block the tracks?

(Objected to for the reason that the witness has not shown sufficient knowledge to give an answer.)

By the COURT: This is to test his knowledge.

A. The Lehigh Valley Railway cars which were used in the transportation of oil from the refiners at Oil City and Titusville to Perth Amboy moved away regularly, and the same cars—the identical cars would come back to Titusville in many cases and be loaded twice and three times per month from the various refiners who shipped to the common destination.

By Judge MEHARD:

Q. Do you know whether complaints were made by the railroad company, and, if so, how frequently, as to the blocking of the tracks at Perth Amboy?

(Objected to by counsel for defense.)

By Judge MEHARD: This is to rebut Mr. Walker's statement that cars were constantly allowed to stand in the yards at Perth Amboy and block the tracks.

By the COURT: Why should the railroad company complain to the shippers?

By Mr. GOWAN: Mr. Walker's testimony was that he was complaining to the Refiners Export Oil Company.

By the COURT: That the railroad company did not make complaints to him would not rebut anything Mr. Walker said.

By Judge MEHARD:

Q. I wish you to state whether the shipments by your company to Perth Amboy ceased because of the construction of and shipments by pipe lines to the seaboard?

443 A. They did not. Our shipments to Perth Amboy ceased in February, 1891—shipments of barreled oil; while the pipe line was not ready for business for more than two years after that.

Q. What was the ground of or the reason for your ceasing shipments?

(Counsel for defendants object; this is not the plaintiff, and it can make no difference what reason this witness had for ceasing to ship.

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But the objection was withdrawn, on the ground that it would probably be shorter to hear the answer.)

A. The reason that we stopped shipping to the United Refiners Export Oil Company was because the attitude of that company towards the Independent Refiners had changed and assumed rather an attitude which did not tend to further the best interests of the independent refiners.

Cross-examination by Mr. GOWAN:

Q. Up to 1891, at the time at which you say shipments to Perth Amboy were suspended, you did ship via the Western New York and Pennsylvania and the Lehigh Valley Railroads all your export oil?
A. Not all, but the greater part of it.
Q. Well, what proportion of it?
A. Well, much the greater part.
Q. Probably shipped 90 per cent.?
A. Well, probably as much as that.
Q. Probably more than that?
A. In that neighborhood.
Q. So that, whether or not you asked for the rate over the Lehigh Valley, you did avail yourself of it and did your business as that way?
A. We used the rates that were published in the tariff.
Q. The rates published over the Lehigh Valley Railroad to Perth Amboy?
444 A. The tariffs which were hung up in the freight office at Titusville by the Western New York and Pennsylvania.
Q. After suspending your shipments in 1891 of export oil to Perth Amboy, to what point did you ship?
A. We shipped oil there to Constable Hook, N. J.
Q. Who controlled that?
A. The Columbia Oil Company.
Q. What interests controlled that company?
A. The Columbia Oil Company.
Q. Don't you know whether it was controlled by the Independent Refiners or by the Standard?
A. Well, it was an independent oil company.

By Judge MEHARD: Nobody had any interest in it except the owners. It was not owned by these people.

By Mr. GOWAN:

Q. When did you begin to ship export oil by pipe line?
A. About the latter part of 1893.
Q. Since that time, practically all your export oil has been shipped by pipe line?
A. The greater part of it.
Q. How much—95 per cent.?
A. I should say about ninety per cent. was shipped by pipe lines.
Q. Between 1891 and 1892, when you were shipping to the Columbia Oil Company, did you ship in barrels or tanks?

CLOSE IN CENTER

A. In both ways.
Q. Which was the larger?
A. I should say about equally divided.
Q. What tank cars did you use?
A. We used our own.

445 *Testimony of D. E. Byles.*

D. E. BYLES, a witness called on behalf of the plaintiff in rebuttal, being duly sworn, testified as follows:

Direct examination by Judge MEHARD:

Q. Where do you reside?
A. In Oil City.
Q. What is your business?
A. Oil refiner.
Q. With what company are you connected?
A. With the Independent Refining Company, Limited.
Q. Since what time?
A. Since 1882, I think.
Q. Where is your refinery located?
A. Just north of Oil City; about a mile out of the city.
Q. Was your company a member of the Independent Refiners' Association of Oil City?
A. Yes, sir.
Q. In 1888 were you a member of that association?
A. Yes, sir.
Q. Do you know of any of your company or representatives making application to Mr. Johnson, the representative of the Western New York and Pennsylvania Railroad Company; to fix a through freight rate, in 1888, or 1887, or at any other time?
A. To what point?
Q. To Perth Amboy?
A. I have no recollection of any such request.
Q. Did you have any conversation with him yourself on that subject?
A. No, sir.
Q. Did your company ship through to Perth Amboy?
A. We did.

446 Q. Well, when your company ceased shipments to Perth Amboy, was it because of the establishment and operation of a pipe line to the seaboard?
A. I- was not.
Q. What was the reason?
A. The attitude of the United Refiners Export Oil Company had changed, and we didn't feel satisfied that they were handling the business to our best interests.
Q. Do you know anything about the blocking of the yards at Perth Amboy by cars sent by the Independent Refiners' Association or any member of that Association, to that point, filled with oil barrels?

A. No personal knowledge, further than that we were asked to hurry our shipments, that they needed more oil to fill their contracts; occasionally we were asked to hold shipments for a short time, until they could relieve their storage by vessels coming in and taking the oil away.

Cross-examination by Mr. GOWAN:

Q. The requests that you have just spoken of—in some cases to hurry and in others to delay shipments, come from that company?

A. From the United Refiners Export Oil Company.

Q. When did you say shipments to Perth Amboy ceased?

A. I think the shipments by our firm ceased in the early part of 1892.

Q. Can't you fix it a little more definitely?

A. Well, possibly in the spring, in the latter part of the spring of 1892; possibly May or June.

Q. To what point, after that date, did you ship your export oil?

A. We shipped some of it to Constable Hook, N. J.

Q. To the Columbia Oil Company?

A. Yes, sir.

Q. And the rest of it?

447 A. I am not sure where the other shipments went; possibly some might have gone to Philadelphia; I wouldn't say positively.

Q. Up to 1892, the attitude you say, of the United Refiners Export Oil Company was entirely satisfactory to you—was it?

A. In a general way, yes, it was fairly satisfactory.

Q. You sold them all your export oil?

A. It nearly all went through that point.

Q. When did your shipment of export oil by pipe line commence?

A. I couldn't say positively, but practically it was in the early fall of 1893.

Q. Since that time practically all of your export oil has been shipped by pipe?

A. Well, the principal part of it.

Q. Well, how much, ninety-five per cent.?

A. I would suppose possibly 90 to 95 per cent.

Q. You know, as a matter of fact, that the railroad companies do not attempt to make rates, or do not make rates in competition with pipe line rates? You know they have no rates under which it is possible to ship by railroad as against pipe?

A. Well, now, I don't know how to answer that question, to make it intelligible. I know so little about their fixing of their rates.

Q. Do you know of any rates on export oil which are as low as the pipe line rates at which you are shipping?

A. Not at the present time; no, sir.

Q. Do you know of any since 1894?

A. I do not; no, sir.

Q. During the time that you were shipping export oil to the Co-

lumbia, between 1892 and 1893, how did you ship your export oil, in barrels or in tanks?

A. Some of it, I think, went in barrels and some by tanks.

448 Redirect examination by Judge MEHARD:

Q. You were asked as to your relations with the United Refiners Export Oil Company, and whether or not you sold your oil to them. I wish you would state what your transaction with the Export Oil Company was—whether it was that of sale, or something else? Did you pay them a commission?

A. We paid them a commission; yes.

By Mr. GOWAN: I don't think that is competent; but I won't press my objection.

By Judge MEHARD: I don't think it has any importance; but there is really a slight inaccuracy in saying that the oil was sold to them. They were brokers. These people sent their oil to them under guarantee of payment, and paid them commissions. That was the real situation.

Testimony of S. Y. Ramage.

S. Y. RAMAGE, a witness called by plaintiff in rebuttal, being duly sworn, testified as follows:

Direct examination by Judge MEHARD:

Q. Where did you reside in 1888?

A. In Reno, Pennsylvania.

Q. That is in the neighborheed of Oil City, is it?

A. Yes, sir.

Q. Were you engaged in the oil refining business at that time?

A. I was.

Q. And for how long prior?

A. I began in 1878.

Q. Did you ever make any request of Mr. Johnson to fix the through rate from your oil district to Perth Amboy?

A. I did not.

Q. Do you know of such request being made by any of your associations?

449 A. No, sir. My knowledge is that that through rate was arranged by Mr. Ruhl for the United Refiners' Export Oil Company.

Q. What rate is that to which you refer—the one of 1888 or prior?

A. The original rate, commencing about 1885 or 1886.

Q. How long did you continue in the oil refining business there?

A. Until 1895.

Q. What was the name of your company?

A. I did business under the style of the Mutual Oil Company.

Q. Did you ship to Perth Amboy?

A. I did.

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Q. You shipped in barrels, did you?
A. I did; yes, sir.
Q. What knowledge have you as to the blocking of the tracks at erth Amboy by cars laden with barrels of oil?
A. I have knowledge that only periodically was there ever a ockade, when vessels in which the oil was to be loaded were late arriving at Perth Amboy to receive their load; then we occasionly had a blockade. I made frequent trips to Perth Amboy, looking fter my business, and know that it was only occasionally that blockles occurred.
Q. And when you speak of its being only occasional, do you mean equently or infrequently?
A. Infrequently.
Q. Did you cease shipping oil to Perth Amboy before you went ut of business?
A. Yes, sir.
Q. Did you cease because of the establishment of a pipe line from our district to the seaboard?
A. No, sir.
Q. Why did you cease?
50 A. We ceased because of a change of ownership in the United Refiners' Export Oil Company, and consequently a hange of attitude.
Q. What was that change?
A. A change in the interests—a sale of interest, as we were led to elieve, to parties representing the Standard Oil Company.

Cross-examination by Mr. GOWAN:

Q. When did you say the change of ownership took place and the ontrol of the United Refiners' Oil Company passed to the Standard il Company?
A. Some time early in 1891.
Q. How did you learn of that?
A. First, by rumor; second, by the admission on the part of Ir. C. H. Ruhl that a change had taken place in the ownership. le denied, however that it was a sale to the Standard Oil Company, ut said it was a sale to a party entirely friendly.
Q. Before that time, then, the United Refiners' Export Oil Comany had been controlled by interests opposed to the Standard Oil ompany?
A. Yes, sir.
Q. You say you had nothing to do with procuring the establishent of a through rate to Perth Amboy via the Western New York Pennsylvania and the Lehigh Valley?
A. I had not.
Q. You were not interested in the shipments by that route?
A. Not particularly. I made shipments by that route occasionlly.
Q. Very small, in proportion to other business?
A. Yes, sir.

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Q. Your works were located on the Erie road?

A. Yes, sir.

451 Q. When did your shipments to Perth Amboy by the Western New York & Pennsylvania and the Lehigh Valley cease?

A. I don't think I shipped anything after 1889 by that route.

Q. So that, in point of fact, I think we may take it for granted from what you have said, that you did not stop shipping in 1889 by the Lehigh Valley and the Western New York & Pennsylvania, to Perth Amboy, because of the suspicion in 1891 that the United Refiners' Export Oil Company had been changed?

A. Certainly not.

Q. You have spoken about having been about Perth Amboy between the years 1888 and 1894, I understood?

A. And 1891.

Q. What took you there—what business, I mean?

A. Looking after our business; seeing that the oil was loaded, and making trips with Mr. Ruhl, with whom we had very frequent interviews both in New York and Oil City.

Q. What concern was it of yours as to the handling of the oil after it reached Perth Amboy? I don't quite understand you?

A. It was our concern, because we were responsible for the oil until it was loaded on the vessel.

Q. What kind of vessels were used in shipping oil from Perth Amboy?

A. Sailing vessels.

Q. No tank vessels?

A. No, sir; not up to 1891.

Q. And how about after 1891?

A. Well, I can only give you from recollection that about 1893 they commenced to ship in bulk, in vessels.

Q. That was after the United Refiners' Export Oil Company had built the storage tanks?

A. Yes, sir.

452 Q. Up to that time, the shipments from that point had been exclusively in barrels?

A. Yes, sir.

Q. You were familiar, as the result of your visits to Perth Amboy, with facilities existing there for the handling of export oil, were you not?

A. I was.

Q. Were there any facilities there except those controlled by the United Refiners' Export Oil Company?

A. No, there were not.

Q. And they were owned by that Company?

A. They were.

Q. I think you have testified that you yourself made through shipments of oil in tank cars to Perth Amboy over the Western New York & Pennsylvania and Lehigh Valley route. I don't mean in this present proceeding, but before?

A. When did I so testify?

Q. Did you not so testify in the hearing before the Commission in these cases?

A. I don't think so. I would like to refresh my memory from the testimony.

Q. Well you had tank cars of your own?

A. I had; yes, sir.

Q. And if you did not ship in tank cars to that point, it was because it was more convenient to ship by barrel, because of the facilities there, wasn't it?

A. No, it was because at that time the trade was oil in barrels, because the demand in the trade was for barreled oil.

Q. I am speaking of shipments to Perth Amboy.

A. That is also what I am speaking of.

Q. Do you remember how frequently you were at Perth Amboy?

A. Very frequently; as many as three or four times a year.

453 Q. But of course you know that shipping from that point in sailing vessels, the arrival of those vessels was always uncertain?

A. Not always uncertain, but quite frequently uncertain.

Q. Of course they were not as regular as the arriving steam vessels?

A. No, sir.

Redirect examination by Judge MEHARD:

Q. You were a member of the Independent Oil Refiners' Association of Oil City, were you?

A. Yes, sir.

Q. And in speaking of shipments to Perth Amboy, have you reference to your own shipments simply, or reference to shipments of your association?

A. I had reference to my own shipments and also to the shipments of my fellow members, because we had knowledge of each others' shipments.

(Counsel for plaintiff offer in evidence the testimony of John Taylor, General Freight Agent of the Lehigh Valley Railroad Company, given before the Interstate Commerce Commission, as found on page 159 to 164 of that testimony.)

Admitted without objection.

454 EDWARD T. JOHNSON—Recalled.

EDWARD T. JOHNSON, recalled by plaintiffs, for further cross-examination.

Examination by Judge MEHARD:

Q. In your examination-in-chief counsel called your attention to a statement. I show you this paper, composed of numerous sheets, and ask you if that is the paper about which you testified yesterday?

A. Yes, sir.

Q. Had you ever seen that paper before you saw it yesterday when you were on the witness stand?
A. I think I had.
Q. When did you see it?
A. When it came to me at my office in Buffalo.
Q. It came to you at your office in Buffalo, when you *you* were acting in what capacity?
A. General Freight Agent of the W. N. Y. & P. Ry., or the General Freight Agent of the Receiver?
Q. When was that?
A. I can't give you the exact date.
Q. It was when you were acting for the Receiver, wasn't it, in 1894?
A. I couldn't say; although, in a general way, I would say it was not; that it was not in 1893.
Q. This is the paper, extending down to here, isn't it?
A. No, sir.
Q. Isn't that all a part of the same?
A. I do not so understand it.
Q. Isn't this all the same exhibit?
A. I don't understand it so. I understand it to be two exhibits. Here is the end of the first exhibit.
Q. This, you say, is the end of the first exhibit?
A. As I understand it, yes.
455 Q. This first paper, you saw that?
A. I think that's the same one that was sent to me.
Q. And wasn't this sent to you at the same time?

(Mr. Patterson objects, that there is nothing on the record to indicate what counsel is talking about.)

Q. I mean the one which succeeds in the record of the Interstate Commerce Commission—the one following.

A. At the present time I can't say definitely when that was sent. I would have to go over my records.
Q. Do you recall that they were both sent to you at the same time?
A. I do not; as those statements come in from time to time, not always at once.
Q. Do you recognize this paper which follows the two to which your attention has been called?
A. Yes, sir.
Q. Who made that paper?
A. The claim clerk in our office.
Q. Under your direction or supervision?
A. Yes, sir.
Q. When was that made?
A. I don't know what time it was made.
Q. Well, it is part of the same, isn't it?
A. This is a part of this.

(Mr. Patterson again objects, that it does not appear on the record what papers are being referred to.)

. The paper referred to last is the statement of claim for over-
ge account, Penn Refining Co., of Oil City, Pa., prior to Sep-
ber 1, 1892.
. Made by the Western New York & Pennsylvania Railroad Co.,
er your supervision?

Objected to by counsel for defense, as the witness was not ex-
ned about that paper.)
y Judge MEHARD: I am examining him now about it chiefly to
fix the date of the other paper.
By Mr. PATTERSON: But you are asking him who made up
that paper.
The paper last referred to by the witness is marked as Exhibit
"3," and the first one shown is marked Exhibit No. "1," and the
nd one as Exhibit No. "2.")

By Judge MEHARD:

. I want to call your attention to this—that those are fastened
ther, and this is marked 25940 and this one is marked in the
e way, 25940. Aren't you mistaken in saying that those papers
e separately delivered? Weren't they all delivered at the same
e?
. I have said I don't know. I didn't say they were separately
vered. I can't say when they would come into the office. I
t go by the records.
. And if that paper came in to you together, what would you
as to the time when it was presented to you?
. I can't say at the present time at what time it was presented.
t would be a matter of record in the office.
. But you would not say that this paper was all presented to you
he same time?
. I do not.
. Did I ask you who sent this paper to you?
. No, sir.
. Who sent it to you?
. I presume that the Penn Refining Company did; I don't
w.
. Wasn't it sent to you by the Interstate Commerce Commis-
?
. No, sir.
. Well, did you send it to them?
. I referred it to our attorney.
. Who was that?
. Mr. Frank Rumsey.
. Mr. Frank Rumsey was attorney for whom?

bjected to by counsel for defendants.
bjection overruled and exception noted to defendants.

A. He is an officer of the company.
Q. But I am wanting to know who Mr. Rumsey repre-
ed in 1894?

Objected to by counsel for defendants.
Objection overruled and exception noted to defendants.

A. He represented the railroad company, or the railway company, whichever it might have been at that time.
Q. Didn't he represent the Receiver during the pending of the Receivership?
A. I think he did. At least he was an officer of the road at that time.

Counsel for plaintiff offer in evidence, as part of their cross-examination, "Exhibits No. 1 and No. 2" of this date.
Counsel for defendants object to the offer as part of the cross-examination of the witness. They have no objection, under the ruling of the Court made yesterday, to plaintiff offering it as part of its case in chief.
By Judge MEHARD: We offered it for the purpose of enabling the Court and the jury to determine from the paper itself the matters about which the witness himself testified from the paper in his examination of yesterday.
By the COURT: Do we understand that you offer it as part of your case?
By Judge MEHARD: Yes, sir; in that way.
By the COURT: Well, in what way?
By Judge MEHARD: In connection with the cross-examination of the witness, for the purpose of enabling the Court and jury to see by the paper itself what it shows and to determine that from the paper, rather than from the witness.
Counsel for the Western New York & Pennsylvania Railway Company and Samuel G. De Coursey, Receiver thereof, object to the offer as not properly offered as a part of the cross-examination of the witness on the stand; and as to those defendants, as incompetent and not material.
458 Counsel for the Lehigh Valley Railroad Company object to the offer, upon the ground that the paper is not evidence against them of any matter, and that it is incompetent and irrelevant.
By the COURT: The witness was recalled to the stand for the purpose of cross-examination. The case is in the same shape as when we made our ruling yesterday and indicated to counsel that we would not accept the paper as part of the cross-examination. If they desire to offer the paper as part of their case, counsel for the other side have indicated that no objection will be made. The objection is therefore sustained and an exception noted to the plaintiff.
By Judge MEHARD: We will then offer the paper generally in the case. We offer the paper composed of what has been marked as Exhibits "1" and "2," we claiming that it is all one paper; and, in that connection, we will also offer Exhibit No. "3," being a paper the witness says was prepared by themselves in their office.
Offer objected to by counsel for the Western New York & Pennsylvania Railway Company, as incompetent and irrelevant and not properly rebuttal.

Objected to by counsel for the Lehigh Valley Railroad Company, who objects to the admission of any of these papers, as evidence against said company, and also to the competency and relevancy of the same; and further, that the evidence is not offered in rebuttal of any evidence submitted by the defendant, the Lehigh Valley Railroad Company.

By the COURT: We will admit Exhibits Nos. "1" and "2" in evidence and exclude Exhibit No. "3" and note an exception to the defendants.

Exception also noted to the plaintiff.

By Judge MEHARD:

Q. My recollection is not distinct. Did you testify yesterday as to the date of the last shipment to Perth Amboy over the
459 route composed of your road, that is, the Western New York & Pennsylvania, and the Lehigh Valley Railroad?

A. I testified as to the last shipment shown in that statement.

Q. What date was that?

A. February 9, 1893.

Q. To Perth Amboy?

A. No, sir; I said the last shipment. The last shipment to Perth Amboy would be January 13, 1891.

Testimony closed.

Counsel for the Lehigh Valley Railroad recalled to the attention of the Court his motion heretofore made to strike out the findings of fact and orders of the Commission offered by plantiff, as to the Lehigh Valley Railroad Company, which motion the Court had previously overruled *pro forma*, with permission to renew it later.

The motion was argued by counsel for the respective sides, and the Court thereupon declined to strike out the findings of facts given in evidence, as requested, and noted an exception to the Lehigh Valley Railroad Company.

Counsel for defendants also called the attention of the Court to its decision reserved on the admission of the award made by the Commission, beginning on page 158 of the petition; whereupon the Court said:

We are of opinion that the finding of an amount of damage was a finding of fact, and is entitled to go to the jury as a finding of fact, in accordance with the Act of Congress; and note an exception to defendants.

Counsel for defendants presented certain points to the Court, upon which the Court was requested to charge the jury, and said points were argued to the Court.

After which, Messrs. Patterson and Gowan went to the jury on behalf of the defendants, followed by Hon. J. W. Lee on be-
460 half of the plaintiff, during the progress of whose argument Court adjourned until Friday, May 23, 1902, at 9:30 A. M.

And now, Friday, May 23, 1902, Court convened, pursuant to adjournment, at 9:30 A. M.

Mr. Lee completed his argument to the jury.

The Court thereupon charged the jury as follows:

BUFFINGTON, *J.*:

GENTLEMEN OF THE JURY: The case which you are called upon to try is one between the Penn Refining Company, Limited, the plaintiff in this case, and the Western New York and Pennsylvania Railroad Company, Samuel G. De Coursey, Receiver of that Company, the Western New York & Pennsylvania Railway Company, and the Lehigh Valley Railroad Company.

You will notice, gentlemen, that the Western New York & Pennsylvania Railroad Company is one corporation and that Samuel G. De Coursey is also sued as the Receiver of that Company, and that there is another company called the Western New York & Pennsylvania Railway company, which is a different corporation.

A brief recital of some general facts will enable you to more clearly understand the issues involved in this case and possibly aid you in the discharge of your duty as jurors.

By the laws of the land, companies or corporations are created for the building and operation of railroads. These companies are termed "common carriers"—and by that we mean that they assume and are bound to carry freight for the public, or whomsoever offers it. That is, a "common carrier" is one who cannot select its customers, but it is bound to carry freight for all persons who may offer such freight to it for carriage. In the performance of this duty the company is bound to treat all persons alike and afford the same accommodations and charge the same freights to all persons for the performance of like services.

461 By the constitution of the United States, Congress was empowered to "regulate commerce among the several states," and it is this provision which enables it to legislate upon and control interstate commerce, or commerce between the states—a subject of which we hear much nowadays. In pursuance of this power, and for the purpose of controlling and regulating interstate commerce, Congress some years ago enacted a statute, and various supplements thereto, which are known as the Interstate Commerce Acts. By these Acts, we may say in a general way, provision is made against railroads charging unfair freights, against discrimination by them against one person or locality, and there is created a Commission known as the Interstate Commerce Commission, which was given certain powers to investigate violations of the law and to take steps looking towards the prevention or continuance of such violations. After the passage of the original Act, it was found that, to enforce its provisions, questions of fact would necessarily arise and have to be determined and passed upon. And that these questions of fact were such as the citizens or company had a right to demand should be passed upon by a jury and not finally determined by the Interstate Commerce Commission. For we call your attention to the fact that the same Constitution that gave Congress the power to regulate

ommerce between the States, provided that "in suits at common w, where the value in controversy shall exceed Twenty Dollars, the ght of trial by jury shall be preserved." The issues involved in this rticular case were of such a nature that the defendant companies d a right to demand that they should be passed upon and deter- ined finally by a jury, and accordingly, in pursuance of this con- tutional right of these defendants to have the facts finally passed on by a jury, the case, after all this litigation, comes down to you as the final arbiters of fact.

I need not say to you as jurors that in passing upon the issues of this case and performing your duty toward ese defendants—giving them the benefit of the constitutional ght of trial by jury—you should recognize that a just performance your duty demands you that you lay aside all feeling and ejudice which often arise in questions of this kind, and in an rnest and just spirit of entire fairness, impartiality and cool-headed dgment, you approach this subject with that spirit of even-handed stice and fairness which should always mark the performance of ty by jurors and judges alike. It is this spirit, gentlemen, which ves weight and stability to the work of judges and jurors, and any her is unworthy of the high duty imposed upon judges and jurors passing upon the rights of their fellow men.

On December 4, 1888, there were in existence two associations, lled respectively The Independent Refiners' Association of Titus- lle, Pa., and The Independent Refiners' Association of Oil City, ., which associations were composed of individuals, firms and rporations engaged in the business of refining petroleum oil in e vicinity of those two cities—which, as we have stated, are both ated in Western Pennsylvalia. Prior to that date these refiners d shipped a certain proportion of their refined product to the board for export. This product had been shipped in barrels by rload lots for some years, and for this service they were charged ty-two cents per barrel—no charge being made for the barrel or weight, as it alleged. This oil was carried from the plaintiff's rks to Perth Amboy, a New York harbor point, on a through rail- d route composed of the Western New York & Pennsylvania ilroad and the Lehigh Valley Railroad.

About September, 1888, it is alleged that these two railroads estab- hed a joint tariff or rate for barrel shipments of oil at the rate of sixty-six cents, and it is alleged that this rate comprised a charge of fourteen cents for the weight of the barrel or pack- age in which the oil was contained. It is contended that s rate, and upon that point we express no opinion—that is a fact you to ascertain—that the effect of this rate was to charge four- n cents for the barrel containing the oil.

Now, the Interstate Commerce Act provides that it shall be un- rful for any common carrier (and I ask your particular atten- n to this language, because it is of vital importance and to be ne in mind), "that it shall be unlawful for any common carrier * * to subject * * * any particular description of traffic any undue or unreasonable prejudice or disadvantage in any re-

spect whatsoever." Let me repeat that passage to you, so that you will have its provisions clearly in mind, because it is important in the determination of this case. The Interstate Commerce Act provides that it shall be unlawful for any common carrier to subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

On December 4, 1888, the plaintiff in this case, The Penn Refining Company, Limited, acting with others through the two independent refiners' associations mentioned, presented a petition to the Interstate Commerce Commission alleging that this sixty-six cent barrel rate, which they alleged charged for the weight of the barrel, had been adopted by the Western New York & Pennsylvania Railroad Company and the Lehigh Valley Railroad Company from Oil City and Titusville to Perth Amboy, and that—we quote the words of the petition—"said rates and charges for said service are excessive, unjust and unreasonable," and that (we now come to the language of the Act to which we called your attention above) the same "subject your petitioners and their said traffic to an undue and unreasonable prejudice and disadvantage, because, among
464 other things, the rates and charges for said service are practically prohibitory upon the traffic of petitioners to New York harbor localities."

This petition, with two others of through lines to other seaboard localities, about New York and Boston, were, by consent of counsel, considered by the Commission together, on the condition that the testimony should "be received in one case with the understanding that it shall apply to the others, so far as it shall be found applicable."

Under this petition, it therefore became the right and the duty of the Commission to receive testimony upon the issue whether a through and joint rate had been established by these two companies, and whether such rate, if established, did "subject the petitioners and their traffic to an undue and unreasonable prejudice and disadvantage in any respect whatsoever."

The Commission found that prior to September 3, 1888, the rates on the lines in question on shipments of oil both in tank and barrels had been the same for a like quantity of that commodity, exclusive of any charge for the weight of the barrel in barrel shipments; but about that time the rates on barrel shipments were increased 14 cents to New York points and more to Boston points, this additional charge being for the weight of the barrel; and as the rates on tank shipments, not including the weight of the tank or package, were not advanced, but allowed to remain as they were, the result was a discrimination in favor of the tank as against the barrel shipper. The commission further found that the circumstances and conditions regulating the use of barrel and tank shipments were not two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper might take his choice and pay accordingly, but that the cheaper mode of transportation—that is, the tank shipment method—was open only to a certain class of ship-

pers, because the tank cars were owned almost entirely by
5 the shippers and were limited in their use to such owners.
The commission found that, "where both modes of trans-
rtation are employed by the carrier and the use of one, the tank
r, is not open to shippers impartially, but is practically limited
one class of shippers, the charge for the barrel package in barrel
ipments, in the absence of a corresponding charge on tank ship-
nts, resulting in a greater cost of transportation to the shipper
barrels on like quantities of oil between like points of shipment
d destination than to the tank shipper, is an unjust discrimination,
bjecting the barrel shipper to an unreasonable disadvantage and
ving the tank shipper an under advantage."
The Commission accordingly, by an order dated November 14,
92, directed the Western New York & Pennsylvania Railroad
mpany and the Lehigh Valley Railroad Company to desist from
arging for the transportation of barrel packages, or to furnish
nk cars on request for shipments, and that these companies make
paration for the freight paid on barrels where the use of tank
rs has not been open to shippers impartially. They also ordered
at the rate on tank and barrel shipments to New York points
ould not exceed 16½ cents per hundred pounds.
The Commission then proceeded to ascertain the damages sus-
ned by the plaintiff company, and about 1895 (the exact date
— not recall), they filed a report, in which they said:
"We make the following findings and orders upon claims filed
d served"—and as far as respects the present company, their find-
g was as follows:
"The claimant, the Penn Refining Company, Limited, of Oil
y, Pa., is entitled to recover from the defendant, The Western New
rk & Pennsylvania Railroad Company and Samuel G. De Cour-
, the Receiver thereof, and the defendant, The Lehigh Valley
ilroad Company, the sum of Eight thousand five hundred and
seventy-nine dollars ($8,579.00), as reparation for damages
5 resulting to said claimant from excessive and unlawful trans-
portation charge exacted upon shipments of petroleum oil
barrels delivered by said claimant to said Western New York
Pennsylvania Railroad Company, or to its said Receiver, for
nsportation over the Western New York & Pennsylvania Rail-
d and the Lehigh Valley Railroad from Oil City, Pa., to Perth
mboy, N. J., which said shipments of oil in barrels were so trans-
ted over said railroad between the third day of September, 1888,
d the 15th day of May, 1894, as appears from claim filed and
ement thereon made by said Western New York & Pennsylvania
ilroad Company and its said Receiver; and the said Western New
rk & Pennsylvania Railroad Company and Samuel G. De Coursey,
Receiver thereof, and the Lehigh Valley Railroad Company
hereby ordered and required to pay to the claimant, the Penn
ining Company, Limited, the said sum of Eight thousand five
ndred and seventy-nine dollars ($8,579.00), together with in-
st thereon at the rate of 6 per cent. per annum from May 15,
4."

These orders the two companies named, after notice given to them, did not comply with and thereupon, those interested in the order made an application to this Court, sitting as a Court of Law, alleging non-compliance by the companies with the order and praying that a trial of the cause be ordered. Hence it comes that this case is now before you for trial.

As the right of this Court to assume jurisdiction and of this jury to try the issues depends upon these preliminary steps being taken and the making of these orders by the Interstate Commerce Commission, we have permitted them to be given in evidence before you, but you will understand, gentlemen, that these orders so made by the Commission have no force or effect on your actions. The questions you are to ascertain are to be passed upon by you, under the evidence in the case given before you, and your con-
467 clusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this Interstate Commerce Commission.

We have allowed findings of fact by the Commission; wherever they have found facts, we have allowed those facts to be given in evidence before you; and those findings of fact are to be considered by you. They are *prima facie* evidence of the matters therein stated, for the Act of Congress provides that "at the trial the findings of fact of said Commission shall be *prima facie* evidence of the matters therein stated." By this term "*prima facie*" is meant, gentlemen, that you are to accept such findings of fact as evidence of the matters therein stated, in the absence of proof to the contrary. I trust I have made the distinction quite clear to you: That so far as the findings of fact by this Commission are concerned, they are *prima facie* evidence of the matters therein stated, and they are to be considered by you in making up your verdict.

You will therefore take all the evidence before you, including the facts found by the Commission, the testimony of the witnesses given before you on the stand, and the depositions read in your hearing, and apply that evidence to the determination of the issues involved in this case.

The first question to which you will turn your attention is whether a joint through rate was established and adopted by both the Western New York & Pennsylvania Railroad Company and the Lehigh Valley Railroad Company, as alleged, about 1888, for the carrying of refined oil in barrels from Titusville and Oil City, in the State of Pennsylvania, to Perth Amboy, in the State of New Jersey.

The establishment and adoption of such joint through rate
468 between the points in these two States by both of these railroads is a primary fact indispensable and necessary to be found in order that the plaintiff shall recover in this case, and unless you find that such joint through rate was established by both

of these roads—such interstate rate—the plaintiff cannot recover, and your verdict should be for the defendants.

If you find that such interstate and joint through rate was established and adopted by both roads for refined oil in barrels, you will next inquire whether this action by the two roads in thus establishing and adopting such interstate joint through rate did, in the words of the Act (and here we come back to the language to which I called your attention) "subject any particular description of traffic—for example, refined oil in barrels—to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

As there is nothing in the Act which defines what undue or unreasonable prejudice or disadvantage is, or what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law but of fact. They are therefore submitted to you, gentlemen, as a jury, to determine.

In arriving at that conclusion, it is proper to call your attention to this point—that the mere fact that there is or may be a preference or advantage given, where refined oil is shipped in some other way—for example, in tank cars—and that a more favorable rate is given to tank car shippers, does not, in and of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act. Hence it follows that the jury, before it can adjudge these companies to have acted unlawfully, to have subjected refined oil in barrels to any undue or unreasonable prejudice or disadvantage, must ascertain the facts and must give due regard to those facts and matters which railroad men, apart from any question arising under the statute, would treat as calling for a preference or advan-
469 tage to be given, for example, in this case, to oil shipped in such tanks. All such facts may and ought to be considered and given due weight by the jury in forming its judgment whether such preference or advantage is undue or unreasonable. In the complexity of human affairs, and especially in commercial affairs, absolute uniformity is well nigh impossible, and some prejudice or disadvantage often occurs where men desire to act with the utmost fairness. It is, however, where such prejudice or disadvantage in interstate commerce reaches the measure of undue or unreasonable, that the Act makes it unlawful.

It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs, and justly, fairly and impartially to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established by these two companies (if you find that to be the fact) did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

If you so find, you will also determine to what extent was the rate undue and unreasonable; and whatever amount you so find under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made and on which it has has paid the undue and unreasonable amount. You will understand

that it is not entitled to recover all the freight it paid, because part of it was undue and unreasonable, but it is only such part of the freight as you find to be undue and unreasonable that the plaintiff is entitled to recover back, and that only upon proof to you of the amount of the shipments made by it upon which the freight was unduly and unreasonably charged.

In this case, you will observe, that you were sworn to try this issue between the plaintiff and four different defendants, to wit, as we have recited to you the Western New York and Pennsylvania
470 Railroad Company, Samuel G. De Coursey, Receiver of that Company, the Western New York and Pennsylvania Railroad company, and the Lehigh Valley Railroad company.

On the part of the Lehigh Valley Railroad company it is shown that on February 11, 1892, it leased its road to the Philadelphia and Reading Railroad company, which latter continued to operate it under said lease until August 1, 1893. It is claimed on behalf of said road that for such period no damage can be found against it or recovered from it. In view of the fact that under the lease in question the Lehigh Valley Railroad company was to be paid by the Reading company a per centage on the gross earnings of the road during the lease, we are of the opinion that the Lehigh Valley Railroad company was not exempt from liability during the lease, if it was chargeable in other respects, and the plaintiff is entitled to recover against it in other respects. In view, however, of the admission of the counsel for the plaintiff that they have shown no shipments during said period and claim no reparation for such, it will be apparent to you that the question as to the giving of this lease need not concern the jury, and I so instruct you.

In regard to the defendants, Samuel G. De Coursey, Receiver, and the Western New York and Pennsylvania Railway Company, it appears that the original company (that is, the Western New York and Pennsylvania Railroad Company) against which this petition was originally filed on December 4, 1888, went into the hands of Samuel G. De Coursey, as receiver, on April 1, 1893. Prior thereto, to wit, on the 14th of November, 1892, an order was made by the Interstate Commerce Commission against the Western New York and Pennsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation.

It is alleged (and upon this point we express no opinion, for you will notice that we leave some facts to be found by you), that
471 thereafter, to-wit, on the twenty-second day of October, 1895, an order was made against the Receiver, Samuel G. De Coursey among others directing him, as Receiver of the road, and the Western New York & Pennsylvania Railroad Company to make reparation to the plaintiff of a specific amount, which has been read in evidence before you.

It is alleged that during this proceeding to thus ascertain the amount of reparation to be made, the Receiver was represented by counsel and took part in those proceedings and resisted the entry of the making of such an order. It is also alleged that he was notified of this order of reparation and de-lined to comply with the same.

If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against the Western New York & Pennsylvania Railroad Company, the original company, in other respects, and that the said railroad company united, as explained above, in making a through joint rate with the Lehigh Valley Railroad Company, and in so doing subjected refined oil in barrels to an undue and unreasonable prejudice or disadvantage, and that when the company ceased to operate its road and it passed into the hands of receiver, such receiver continued to maintain such rate and declined to obey the desisting and reparation orders, and continued the litigation, then we are of opinion that such acts and the adoption of the rate, the receiver, as receiver, has so acted that he should not be exempt from the verdict that this jury might find, if in other respects the plaintiff is entitled to recover a verdict. And as, under the decree of this Court, under which this road was sold to the Western New York & Pennsylvania Railway Company, the said company was made liable for liabilities incurred by the receiver, we instruct you that if the plaintiff is entitled, under the foregoing instructions, to a verdict against the receiver, the jury would
472 be warranted in also rendering a verdict against the Western New York & Pennsylvania Railway Company.

Inasmuch as each and every one of the points presented by the several defendants ask us, in each case, to give binding instructions to the jury to find a verdict for the several defendants, we decline to give such peremptory instructions, the points are therefore severally refused, and exception noted for the several defendants presenting the same.

And now, to wit, May 23, 1902, counsel for defendants severally except to the foregoing Charge of the Court to the jury, with leave granted to specify the portions thereof excepted to upon the filing of the charge.

Points Submitted.

Counsel for plaintiff submitted no points.

Counsel for defendants submitted the following points:

By the W. N. Y. & P. R. R. Co. and Samuel G. De Coursey, Receiver.

That under all the evidence the verdict of the jury should be for the defendant, The Western New York & Pennsylvania R. R. Co. and Samuel G. De Coursey, Receiver thereof.

Refused.

By the W. N. Y. & P. Ry. Co.

That under all the evidence the verdict of the jury should be for the defendant, The Western New York & Pennsylvania Ry. Co.

Refused.

By Samuel G. De Coursey, Receiver.

That under all the evidence the verdict of the jury should be for

the defendant, Samuel G. De Coursey, Receiver of the Western New York & Pennsylvania R. R. Co.

Refused.

473 By the W. N. Y. & P. R. R. Co.

That under all the evidence the verdict should be for the defendant, The Western New York & Pennsylvania R. R. Co.

Refused.

By the Lehigh Valley R. R. Co.

I. To entitle the plaintiff to recover, it must have proven to the satisfaction of the jury that it sustained a loss equal to the amount awarded to it by the Interstate Commerce Commission, because of having been unable to secure tank cars and of being consequently obliged to ship in barrels the oil covered by the award, and as there is no evidence which would justify the jury in so finding, the verdict should be for the defendant, the Lehigh Valley Railroad Company.

II. As it is conceded that no oil originated on its line, the Lehigh Valley Railroad Company as a common carrier, was under no obligation to furnish to the plaintiff or to other shippers of oil, cars for the carriage of the same, but it was obliged to receive from the Western New York & Pennsylvania Railroad Company and transport to Perth Amboy any cars, whether box or tank, loaded with oil, which were delivered to it by the Western New York & Pennsylvania Railroad Company, and was entitled to make for such service a reasonable charge; and as the Interstate Commerce Commission has found the rates charged and received by the Lehigh Valley Railroad Company on oil shipped in barrels were reasonable, the plaintiff cannot recover any part of the same, even though the plaintiff may have been obliged to ship in barrels because of the refusal after demand made of the Western New York & Pennsylvania Railroad Company to furnish tank cars for the same, and the verdict should therefore be for the defendant, the Lehigh Valley Railroad Company.

474 III. The Lehigh Valley Railroad Company, by joining with the Western New York & Pennsylvania Railroad Company in the establishment of a through rate from the point of origin of the oil to Perth Amboy, did not make itself liable to any one injured because of the unlawfulness of such through rate, except to the extent to which its participation in the same contributed to such injury, and as the award of the Interstate Commerce Commission against the Lehigh Valley Railroad Company, upon which this action is founded, went beyond this and charged the Lehigh Valley Railroad Company with the alleged overcharge made by both companies to the through line, the award was not a lawful one, and your verdict should therefore be for the defendant, the Lehigh Valley Railroad Company.

IV. The award made by the Interstate Commerce Commission was an unlawful one in that it directed the Lehigh Valley Railroad Company to pay to the plaintiff alleged overcharges for the carriage of its oil made by the Philadelphia and Reading Railroad Company, which, under a lease dated February 11th, 1892, operated the rail-

road of the Lehigh Valley Railroad Company between February 11th, 1892, and August 1st, 1893, and your verdict, therefore, should be for the defendant, the Lehigh Valley Railroad Company.

V. If the jury believe, and the evidence to this effect is uncontradicted, that the only shipments made in tank cars over the Lehigh Valley Railroad were those made by members of the Association, of which the plaintiff was one, then such tank car shipments did not constitute a discrimination against the plaintiff which would support or justify the award made by the Interstate Commerce Commission, and hence your verdict should be for the defendant, the Lehigh Valley Railroad Company.

VI. Under the evidence, the plaintiff is not entitled to recover from the defendant, the Lehigh Valley Railroad Company,
475 and your verdict should therefore be for the defendant, the said Lehigh Valley Railroad Company.

All of which points were refused.

And thereupon, counsel for the defendant, The Western New York and Pennsylvania Railroad and Samuel G. De Coursey, Receiver thereof, and The Western New York and Pennsylvania Railway Company, by leave of Court, excepted to the charge of the Court in the following particulars, viz:

1. In charging—

"The Commission accordingly, by an order dated November 14th, 1892, directed the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company to desist from charging for the transportation of barrel packages, or to furnish tank cars on request for shipments, and that those companies make reparation for the freight paid on barrels where the use of tank cars has not been open to shippers impartially."

2. In charging—

"The questions you are to ascertain are to be passed upon by you, under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this Interstate Commerce Commission."

3. In charging:

We have allowed findings of fact by the Commission wherever they have found facts, we have allowed those facts to be given in evidence before you; and those findings of fact are to be considered by you. They are *prima facie* evidence of the matters therein
476 stated, for the Act of Congress provides that "At the trial the findings of fact of said Commission shall — *prima facie* evidence of the matters therein stated." By this term *"prima facie"* is meant, gentlemen, that you are to accept such findings of fact as evidence of the matters therein stated in the absence of proof to the contrary. I trust I have made the distinction quite clear to you;

that so far as the findings of fact by this Commission are concerned, they are *prima facie* evidence of the matters therein stated, and they are to be considered by you in making up your verdict."

4. In charging—

"The first question to which you will turn your attention is whether a joint through rate was established and adopted by both the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company, as alleged, about 1888, for the carrying of refined oil in barrels from Titusville and Oil City, in the State of Pennsylvania, to Perth Amboy, in the State of New Jersey. The establishment and adoption of such joint through rate between the points in these two States by both of these railroads is a primary fact indispensable and necessary to be found in order that the plaintiff shall recover in this case, and unless you find that such joint through rate was established by both of these roads, such interstate rate—the plaintiff cannot recover and your verdict should be for the defendants."

5. In charging,—

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs justly, fairly and impartially, to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established by these two companies (if you find that to be the fact) did subject the oil shipped in barrels in any undue or unreasonable prejudice or disadvantage in any respect whatsoever. If you so find, you will also determine to what extent was the rate undue and unreasonable, and whatever amount you so find under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made on which it has paid the undue and unreasonable amount."

477

6. In charging—

"In regard to the defendant, Samuel G. De Coursey, Receiver, and the Western New York and Pennsylvania Railway Company, it appears that the original company (that is, the Western New York & Pennsylvania Railroad Company) against which this petition was originally filed on December 4, 1888, went into the hands of Samuel G. De Coursey, as Receiver, on April 1, 1893. Prior thereto to-wit, on the 14th of November, 1892, an order was made by the Interstate Commerce Commission against the Western New York & Pendsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation.

It is alleged (and upon this point we express no opinion, for you will notice that we leave some facts to be found by you) that thereafter, to-wit, on the twenty-second day of October, 1895, on order was made against the Receiver, Samuel G. De Coursey, among others, directing him, as Receiver of the road, and the Western New York & Pennsylvania Railroad Company to make reparation to the plaintiff of a specific amount, which has been read in evidence before you.

It is alleged that during this proceeding to thus ascertain the amount of reparation to be made, the Receiver was represented by counsel and took part in those proceedings and resisted the entry of

the making of such an order. It is also alleged that he was notified of this order of reparation and declined to comply with the same.

If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against the
478 Western New York and Pennsylvania Railroad Company, the original company, in other respects, and that the said Railroad Company united, as explained above, in making a through joint rate with the Lehigh Valley Railroad Company, and in so doing subjected refined oil in barrels to an undue and unreasonable prejudice or disadvantage, and that when the Company ceased to operate its road and it passed into the hands of Receiver, such Receiver continued to maintain such rate and declined to obey the desisting and reparation orders, and continued the litigation, then we are of opinion that such acts and the adoption of the rate, the Receiver, as Receiver, has so acted that he should not be exempt from the verdict that this jury might find, if in other respects the plaintiff is entitled to recover a verdict. And as, under the decree of this Court, under which this road was sold to the Western New York and Pennsylvania Railway Company, the said Company was made liable for liabilities incurred by the Receiver, we instruct you that if the plaintiff is entitled, under the foregoing instructions, to a verdict against the Receiver, the jury would be warranted in also rendering a verdict against the Western New York and Pennsylvania Railway Company.

7. In charging—

"Inasmuch as each and every one of the points presented by the several defendants ask us, in each case, to give binding instructions to the jury to find a verdict for the several defendants, we decline to give such peremptory instructions, the points are, therefore, severally refused, and exception noted for the several defendants presenting the same."

And inasmuch as the said charge and opinion, notes of testimony and rulings of the Court so excepted to do not appear upon the record, the said counsel for the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof, and The Western New York and Pennsylvania
479 Railroad Company, two of the said defendants, did then and there tender this Bill of Exceptions to the notes of testimony, rulings and opinion of said Court, and requested the seal of the Judge aforesaid should be put to the same according to the Act of Congress in such case made and provided.

And thereupon the aforesaid Judge, at the request of the said counsel for the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof, and the Western New York and Pennsylvania Railway Company, did put his seal to this Bill of Exceptions pursuant to the aforesaid Act of Congress in such case made and provided, this 24th day of February, 1903.

[SEAL.] JOS. BUFFINGTON, *Judge.*

480 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable, the Jud
of the Circuit Court of the United States, for the Western Dist
of Pennsylvania, Greeting:

Because, in the record and proceedings, as also in the rendit
of the judgment of a plea which is in said Circuit Court before y
between Penn Refining Company, Limited, plaintiff and West
New York and Pennsylvania Railroad Company, and Samuel
De Coursey, the Receiver thereof, the Western New York and Pe
sylvania Railway Company, and the Lehigh Valley Railroad C
pany, defendants, at No. 23 of May Term, 1901, a manifest er
hath happened, to the great damage of the said defendant, as
their complaint appears, we being willing that error, if any h
been, should be duly corrected, and full and speedy justice d
to the parties aforesaid, in this behalf, to command you, that if ju
ment is therein given that then under your seal, distinctly
openly, you send the record and proceedings aforesaid, with
things concerning the same to the United States Circuit Court
Appeals for the Third Circuit, together with this writ, so that
have the same at Philadelphia in said Circuit, on the fifth day
April next; in the said Appellate Court to be then and there he
that the record and proceedings aforesaid, being inspected,
United States Circuit Court of Appeals may cause further to be d
to correct that error, which of right and according to the laws of
United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
Supreme Court of the United States, at Pittsburg, this fourth
of March, A. D. 1903.

[SEAL.] H. D. GAMBLE, *Clerk*

481 *Bond.*

Know all men by these presents, that we, the Western New Y
and Pennsylvania Railroad Company, and Samuel G. De Cours
Receiver thereof, the Western New York and Pennsylvania Railw
Company, and the Lehigh Valley Railroad Company, princip
and the American Surety Company of New York, a corporati
under the laws of the State of New York, are held and firmly bou
unto the Penn Refining Company, Limited, its successors and
signs, in the sum of Twenty-Six Thousand Dollars ($26,000.0
lawful money of these United States, to be paid to the said Pe
Refining Company, Limited, its successors and assigns; for whi
payment well and truly to be made we do bind ourselves and
successors, jointly and severally, firmly by these presents.

In witness whereof, the said principals have caused these prese
to be executed by their attorneys in this behalf, and the said Sur
has hereunto set its corporate seal, duly attested by its proper o
cers, this 2nd day of March, A. D. 1903.

Whereas, the said Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver thereof, the Western New York and Pennsylvania Railway Company, and the Lehigh Valley Railroad Company have this day taken a writ of error to the United States Circuit Court of Appeals for the Third Circuit, to reverse the judgment rendered in the above entitled case in the United States Circuit Court for the Western District of Pennsylvania.

Now the condition of this obligation is such that if the above bounden the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver thereof, the Western New York and Pennsylvania Railway Company, and the Le-
482 high Valley Railroad Company shall prosecute the said writ of error with effect, and answer all costs and damages if they fail to make said writ of error good, then this obligation to be void. Otherwise to be and remain in full force and virtue.

Attest:

WESTERN NEW YORK & PENNSYLVANIA R. R. CO., AND
SAMUEL G. DE COURSEY, *Receiver Thereof,*
WESTERN NEW YORK & PENNSYLVANIA RY. CO.,
LEHIGH VALLEY R. R. CO.,
By PATTERSON, STERRETT & ACHESON,
Their Attorneys.

AMERICAN SURETY COMPANY OF NEW YORK,
By JOS. W. HAY,
Resident Vice-President.

Attest:

B. McMILLAN,
Resident Assistant Secretary.

483 *Citation.*

UNITED STATES OF AMERICA, *Western District of Pennsylvania, ss:*

To Penn Refining Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Third Circuit, to be holden at Philadelphia, in said Circuit, on the 5th day of April next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Western District of Pennsylvania, wherein Western New York and Pennsylvania Railroad Company, Samuel G. De Coursey, the Receiver thereof, The Western New York and Pennsylvania Railway Company, and the Lehigh Valley Railroad Company are plaintiffs in error and you are defendant in error, to show cause if any, you know or have to say, why the judgment entered against the said plaintiffs in error, as by their complaint appears, should not be duly reversed and full and speedy justice done to the parties aforesaid in this behalf.

Witness my hand this 4th day of March, 1903.

JOSEPH BUFFINGTON, *Judge.*

Certificate.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, Clerk of the Circuit Court of the United State for the said District, do hereby certify that the annexed and for going pages contain a true copy of the record and proceedings in th above entitled case, so full and entire as the same remains of reco and on file in my office.

In testimony whereof, I have hereunto signed my name an affixed the seal of the said Court, at Pittsburgh, this — day of Apr A. D. 1903.

[SEAL.] H. D. GAMBLE, *Clerk.*

484 In the United States Circuit Court of Appeals, Third Circui

No. —, September Term, 1903.

WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY an SAMUEL G. DE COURSEY, Receiver Thereof; THE WESTERN NE YORK & PENNSYLVANIA RAILWAY COMPANY, and THE LEHIG VALLEY RAILROAD COMPANY, Plaintiffs in Error,

vs.

PENN REFINING COMPANY OF OIL CITY, PENNSYLVANIA, a Citize of the State of Pennsylvania, Defendant in Error.

In the Circuit Court of the United States for the Western Distri of Pennsylvania.

Among the rolls, records and judicial proceedings had in th Circuit Court of the United States in and for the Western Di trict of Pennsylvania, at No. 23 of May Term, 1901, May be foun the following words and figures, to-wit:

485 No. 23, May Term, 1901.

PENN REFINING COMPANY, LIMITED, a Limited Partnership Orga ized under and by Virtue of the Laws of the State of Pennsylvani and a Citizen Thereof, Plaintiff,

vs.

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY an SAMUEL G. DE COURSEY, Receiver Thereof; THE WESTERN NE YORK AND PENNSYLVANIA RAILWAY COMPANY, and THE LEHIG VALLEY RAILROAD COMPANY, Defendants.

Bill of Exceptions, ex Parte Lehigh Valley Railroad Company.

Be it remembered, that in the same term came the said plainti unto the said Court and impleaded the said defendants in a certai proceeding by petition under Act of Congress, etc., in which th

said plaintiff declared (prout petition) and the said defendants answered (prout answers). Thereupon issue was joined between them.

And afterwards, to-wit, at a session of said Court held at the district aforesaid before Honorable Joseph Buffington, Judge of the said Court, the 19th day of May, 1902, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly empaneled (prout list of jurors) at which day came as well the said plaintiff as the said defendants by their respective attorneys; and the jurors of the jury aforesaid empaneled to try the said issue being also called, came and were then and
486 there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said Lehigh Valley Railroad Company, one of the said defendants, excepted to certain rulings of the said Court, as appear in the following notes of the trial made by the official stenographer of the said Court:

And thereupon counsel for the defendant, the Lehigh Valley Railroad Company, by leave of Court, excepted to the charge of the Court in the following particulars, viz.:

1. In charging,

"The commission accordingly, by an order dated November 14, 1892, directed the Western New York & Pennsylvania Railroad Company and the Lehigh Valley Railroad Company to desist from charging for the transportation of barrel packages, or to furnish tank cars on request for shipments, and that these companies make reparation for the freight paid on barrels where the use of tank cars has not been open to shippers impartially."

2. In charging,

"The questions you are to ascertain are to be passed upon by you, under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this Interstate Commerce Cimmission."

3. In charging,

"We have allowed findings of fact by the Commission; wherever they have found facts, we have allowed those facts to be
487 given in evidence before you; and those findings of fact are to be considered by you. They are *prima facie* evidence of the matters therein stated, for the Act of Congress provides that 'At the trial the findings of fact of said Commission shall be *prima facie* evidence of the matters herein stated.' By this term '*prima facie*' is meant, gentlemen, that you are to accept such findings of fact as evidence of the matters therein stated in the absence of proof to the contrary. I trust I have made the distinction quite clear to you: that so far as the findings of fact by this Commission

are concerned, they are *prima facie* evidence of the matters therein stated, and they are to be considered by you in making up your verdict."

4. In charging,

"The first question to which you will turn your attention is whether a joint through rate was established and adopted by both the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company as alleged, about 1888, for the carrying of refined oil in barrels from Titusville and Oil City in the State of Pennsylvania, to Perth Amboy, in the State of New Jersey. The establishment and adoption of such joint through rate between the points in these two States by both of these railroads is a primary fact indispensable and necessary to be found in order that the plaintiff shall recover in this case and unless you find that such joint through rate was established by both of these roads, such Interstate rate—the plaintiff cannot recover and your verdict should be for the defendants."

5. In charging:

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and
488 proofs and justly, fairly and impartially, to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established by these two companies (if you find that to be the fact) did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. If you so find, you will also determine to what extent was the rate undue and unreasonable, and whatever amount you so find under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made and on which it has paid the undue and unreasonable amount."

6. In charging:

"On the part of the Lehigh Valley Railroad Company, it is shown that on February 11, 1892, it leased its road to the Philadelphia & Reading Railroad Company, which latter continued to operate it under said lease, until August 1, 1893. It is claimed on behalf of said road that for such period no damages can be found against it or recovered from it. In view of the fact that under the lease in question, the Lehigh Valley Railroad Company was to be paid by the Reading Company a percentage on the gross earnings of the road during the lease, we are of opinion that the Lehigh Valley Railroad Company was not exempt from liability during the lease if it was chargeable in other respects, and the plaintiff is entitled to recover against it in other respects. In view, however, of the admission of counsel for plaintiff that they have shown no shipments during said period and claim no reparation for such, it will be apparent to you that the question as to the giving of this lease need not concern the jury, and I so instruct you."

And inasmuch as the said charge and opinion notes of
489 testimony and rulings of the Court so excepted to do not appear upon the record, the said counsel for the said Lehigh

Valley Railroad Company, one of the said defendants, did then and there tender this Bill of Exceptions to the notes of testimony, rulings and opinion of said Court and requested the seal of the Judge aforesaid should be put to the same according to the Act of Congress in such case made and provided.

And thereupon, the aforesaid Judge, at the request of the said counsel for the Lehigh Valley Railroad Company, did put his seal to this Bill of Exceptions pursuant to the aforesaid Act of Congress in such case made and provided, this 24th day of February, 1902.

[SEAL.] JOS. BUFFINGTON, *Judge.*

Stipulation.

It is stipulated by counsel for plaintiff in error and defendant in error, that the Bill of Exceptions on part of the Lehigh Valley Railroad Company be printed separately omitting the docket entries, pleadings, notes of trial charge, assignment of errors and all papers relating to said appeal, except the formal parts of said Bill of Exceptions; the said parts of the record omitted having been printed in the record of Appeal and writ of error on part of the Western New York and Pennsylvania Railroad Company and others, at the same number and term are made a part hereof, with the same force and effect as if the same were here printed *in extenso.*

490 *Certificate.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, Clerk of the Circuit Court of the United States for the said District, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above entitled case, except in so far as the same are embraced in the stipulation making the record of Appeal and Writ of Error of the Western New York and Pennsylvania Railroad Company *et al.* a part hereof.

In testimony whereof witness my hand and the seal of said Court at Pittsburgh this 6th day of August, A. D. 1903.

[SEAL.] H. D. GAMBLE, *Clerk.*

491 And afterwards, to wit, on the fourth day of March, A. D., 1904, this cause being called for argument on the transcripts of record from the Circuit Court of the United States for the Western District of Pennsylvania before Hon. George M. Dallas, and Hon. George Gray, Circuit Judges, and Hon. Andrew Kirkpatrick, District Judge, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to wit on the tenth day of June, A. D., 1904, the court made the following order in this cause, viz.:

These cases were argued before Dallas and Gray, Circuit Judges, and the late Andrew Kirkpatrick, District Judge. Their situation at the time of the death of Judge Kirkpatrick was such as to preclude their decision by the surviving Judges. Therefore it is now, June 10th, 1904, ordered that they be set down for re-argument at the September Term, 1904; and the Clerk is directed to place them at the head of the Bar Docket for said term, and to mail to each of the counsel concerned a copy of this order.

GEO. M. DALLAS,
GE. GRAY,
Circuit Judges.

492 And afterwards, to wit, on the twenty-fifth day of October, A. D. 1904, this cause being called for argument on the transcript of record before the Hon. George M. Dallas and Hon. George Gray, Circuit Judges, and Hon. Edward G. Bradford, District Judge, and being argued by counsel for the respective parties, and the court not being fully advised in the premises takes further time for consideration therof.

And afterwards, to wit, on the first day of May, A. D., 1905, comes the parties aforesaid by their counsel aforesaid and the court now being fully advised in the premises render the following opinion, to wit:

In the United States Circuit Court of Appeals for the Third Circuit.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, Receiver Thereof; THE WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY and THE LEHIGH VALLEY RAILROAD COMPANY, Plaintiffs in Error,

v.

PENN REFINING COMPANY, LIMITED, OF OIL CITY, PENNSYLVANIA, a Citizen of the State of Pennsylvania, Defendant in Error.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, Receiver Thereof; THE WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, and J. G. MCCULLOUGH and E. B. THOMAS, the Receivers Thereof; THE ERIE RAILROAD COMPANY, and the DELAWARE AND HUDSON CANAL COMPANY, Plaintiffs in Error,

v.

PENN REFINING COMPANY, LIMITED, OF OIL CITY, PENNSYLVANIA, a Citizen of the State of Pennsylvania, Defendant in Error.

493 Before Dallas and Gray, Circuit Judges, and Bradford, District Judge.

BRADFORD, *District Judge:*

The questions before us arise on writs of error to the circuit court of the United States for the western district of Pennsylvania, in two

statutory actions brought April 11, 1901, by the Penn Refining Company, Limited, of Oil City, Pennsylvania, for the recovery of certain sums of money respectively mentioned in two orders of reparation in its favor made October 22, 1895, by the Interstate Commerce Commission, together with interest. One of these actions, No. 23 May Term, 1901, was brought against the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, receiver thereof, the Western New York and Pennsylvania Railway Company and the Lehigh Valley Railroad Company, and the other, No. 25 May Term, 1901, against the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, receiver thereof, the Western New York and Pennsylvania Railway Company, the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, the Erie Railroad Company and the Delaware and Hudson Canal Company. In No. 23 a verdict for the plaintiff was found May 23, 1902, for $12,706.92, and in No. 25 a verdict for the plaintiff was found on the same day for $514.30. Judgment on verdict was entered in each action February 12, 1903. The assignments of error in both cases by consent of counsel and as a matter of convenience were argued at the same time and appropriately may be considered in one opinion. The order of reparation on which action No. 23 is founded was made in proceedings, No. 154, before the Interstate Commerce Commission, instituted December 4, 1888, the Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, being the petitioners, and the Western New York and Pennsylvania Railroad Company, the
494 New York, Lake Erie and Western Railroad Company and the Lehigh Valley Railroad Company being the original respondents. The order of reparation on which action No. 25 is founded was made in proceedings, No. 155, before the Commission, also instituted December 4, 1888, the same refiners' associations being the petitioners, and the Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company, the Delaware and Hudson Canal Company, the Fitchburg Railroad Company and the Boston and Maine Railroad Company being the original respondents. It appears that the plaintiff below was and is a member of the Independent Refiners' Association of Oil City, Pennsylvania. The order of reparation in proceedings No. 154 is as follows:

"The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of eight thousand five hundred and seventy-nine dollars ($8,579.00) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company, or to its said receiver, for transportation over the Western New York & Pennsylvania Railroad and the Lehigh Valley

Railroad from Oil City, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York & Pennsylvania Railroad Company and its said receiver; and the said Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver
495 thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of eight thousand five hundred and seventy-nine dollars ($8,579.00) together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894."

The order of reparation in proceedings No. 153 is as follows:

"The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the New York, Lake Erie & Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, and the defendant, the Delaware & Hudson Canal Company, the sum of three hundred and forty three dollars and fifty eight cents ($343.58), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York, Lake Erie and Western Railroad, the Delaware and Hudson Canal Co.'s railroad and the Central Railroad of New Jersey from Oil City, Pa., to Newark, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the
496 receivers thereof, and the Delaware and Hudson Canal Company are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of three hundred and forty three dollars and fifty eight cents ($343.58), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894."

The plaintiff below recovered in each action judgment for the full amount awarded in the order of reparation, together with interest at the specified rate from May 15, 1894. The independent refiners' associations in their petitions in cases No. 153 and 154 before the commission alleged in substance, among other things, that they were composed of a number of separate and distinct refining companies organized for the purpose of obtaining from railroad companies equal, reasonable and just rates of freight for refined petro-

leum and its products, manufactured and sold by the members of the petitioning associations at and from works owned and operated by them in the oil regions of Pennsylvania at or near Titusville and Oil City respectively; that in the conduct of their business the members of the petitioning associations had for several years shipped from their works large quantities of petroleum over the railroads of the respondents; and that the respondents as common carriers engaged in interstate commerce had violated the provisions of the interstate commerce act of February 4, 1887, in establishing and collecting from the members of the petitioning associations excessive, unjust and unreasonable through rates and charges for the transportation over the lines of the respondents of petroleum in barrels in carload lots, and in giving an undue and unreasonable preference or advantage to shippers of petroleum and its products other than the members of the petitioning associations, and in subjecting the latter to an undue and unreasonable prejudice and disadvantage.

497 In each case the petitioners prayed, among other things, that the commission would order the respondents to desist from the acts complained of and to make such reparation in the premises to the petitioners as should be found just and proper. The assignments of error are numerous and it is unnecessary to take them up seriatum and give to each a separate consideration. They may be divided into three groups, raising respectively three classes of questions, namely, those relating to the conduct of the trial in the court below, those relating to the lawfulness of the order of reparation, and those in other respects bearing upon the validity of the judgment recovered.

In each action error has been assigned by all the defendants therein to the admission in evidence of a paragraph from the report of the commission containing the following allegations:

"After full investigation and mature consideration * * * we hold, that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shippers in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers."

This statement was objected to as "not containing a finding
498 of fact, but involving a conclusion of law." The objection was overruled, the learned district judge remarking, "we think the paragraph constitutes a finding of fact, and the objections are therefore overruled." All of the paragraph with the exception of the concluding negative allegation that "no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers,"

consists of mere legal conclusion. Taken as a whole it is argumentative, and when pronounced and admitted by the court as "a finding of fact," was calculated unduly to influence and perchance to mislead the jury to the prejudice of the defendants by causing the belief, possibly on insufficient grounds, that the charge for the barrel package in barrel shipments of oil complained of was not reasonable and just as required by the interstate commerce act. The subject to which it related was of vital importance in the case. Whether the charge for the barrel package was reasonable and just, or unjust and excessive, was a question to be decided by the jury on proper evidence, and not on mere arguments and legal conclusions of the commission. The interstate commerce act, as originally passed (24 Stat. 379) manifestly contemplated and intended that pecuniary reparation in proper cases should be made to persons sustaining damage through the violation of its provisions by a common carrier subject thereto, whether proceedings were instituted by complaint before the commission, on the one hand, or, on the other, were brought in the first instance in a court of the United States. It provided that such common carrier violating its provisions should be "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation;" that "any person or persons claiming to be damaged" through such violation "may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own be-
499 half for the recovery of the damages for which such common carrier may be liable under the provisions of this act;" that, should complaint be made to the commission and the carrier not "make reparation for the injury alleged to have been done" within a limited period, it should be the duty of the Commission to investigate the same, and make "recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured," and, if it should appear that "any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation," to notify such common carrier to "make reparation for the injury so found to have been done * * * within a reasonable time, to be specified by the Commission." The commission, although clothed with quasi judicial functions, is an administrative body in contradistinction to a judicial tribunal. Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567, 613. Int. C. C. *v.* Brimson, 154 U. S. 447, 474, 489. Int. C.C. *v.* Louisville & N. R. Co., 73 Fed. 409. Int. C.C. *v.* Cin. &c. R. Co., 64 Fed. 981. No "lawful order or requirement" of the commission, referred to in section 16, executed itself. Should the carrier or carriers to whom it is directed not voluntarily obey it, it can be enforced only through judicial proceedings as provided for in that section. Under the act as originally passed such proceedings were solely in equity. As the constitutional guarantee of the right to trial by jury attaches to the enforcement in a federal court of an order or requirement of mere pecuniary reparation, there was no means to compel payment, and such order or requirement, if not a

nullity, was at least ineffective. It was, consequently, the uniform practice of the commission, prior to the taking effect of the amendatory act of March 2, 1889, (25 Stat. 855) to decline to order, require or recommend pecuniary reparation. Councill *v.*
500 Railroad Co., 1 I. C. C. R. 339. Heck & Petree *v.* Railway Co., 1 I. C. C. R. 495. Riddle, Dean & Co. *v.* Railroad Co., 1 I. C. C. R. 594, 607. Rawson *v.* Railroad Co., 3 I. C. C. R. 266. Macloon *v.* Railway Co., 5 I. C. C. R. 84. Such refusal on the part of the commission was based on one or the other of two grounds; one of them being, as stated in Heck & Petree *v.* Railway Co., that "the claim for pecuniary damages made by complainants * * * presents a case at common law in which the defendants are entitled to a jury trial;" and the other, as stated in Rawson *v.* Railway Co., that "as the statute provided for no trial by jury in the courts to enforce our awards in controversies such as were triable at Common Law and where more than twenty dollars was involved, we could award no reparation in consequence of the provisions of the seventh amendment to the Constitution of the United States."

But by the act of March 2, 1889, section 16 was so amended as to provide for trial by jury and judgment as at common law on the law side of the court in proceedings for the enforcement of orders or requirements of the commission involving matters "founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States." In proceedings at law under section 16, as amended, for the enforcement of an order or requirement of the commission, the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless, waived, required by the constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury. Section 14 of the interstate commerce act as amended provides, among other things, as follows:

"That whenever an investigation shall be made by said
501 commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found."

And section 16 as amended provides with respect to proceedings at law in a circuit court of the United States in case of the disregard of a lawful order or requirement of the commission, among other things, that, where "the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, * * * at the trial the findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated." The act does not make the

mere legal opinions, arguments or reasons of the commission *prima facie* evidence or evidence of any kind in any judicial proceeding. It was not the intent of the act to introduce into proceedings for the recovery of pecuniary reparation awarded by the commission elements of uncertainty, complexity or confusion, foreign to any orderly system of judicial procedure. Not only did the paragraph in question from the report of the commission include conclusions of law, but the jury was instructed that these conclusions were findings of fact. In this there was error tending to mislead and the assignment must, therefore, be sustained. The constitutionality of the provisions making "findings of fact" *prima facie* evidence before a jury has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guarantee relative to trial by jury in the courts of the United States does not exclude legislative authority to effect convenient changes in
502 the rules of evidence, involving no detriment to litigants.

In each of the two actions error has been assigned to the admission of evidence of the finding of fact as appearing in the report and order of the commission on the subject of reparation marked Exhibit H. The court in overruling the objections made on the part of the defendants, among other things, said:

"The objections to the admission of this order as an order are overruled. The order is received in evidence, and its effect is restricted simply as showing the basis on which the statutory proceedings by the petition is based, and is not to have any binding effect as an order upon the jury; to this extent, and to this extent only, the order is admitted as such in evidence."

Had the learned judge stopped at this point probably the defendants would have had no just cause of complaint. But he proceeded as follows:

"As to the findings of fact contained or embraced in the order, we are of opinion that the objections thereto should be overruled. We are of opinion that these findings of fact are made *prima facie* evidence under the act of Congress."

Exhibit H is composed of heterogeneous matter, containing not only findings of fact, but legal arguments, opinions and other conclusions. It is fairly to be inferred from the provisions of sections 14 and 16 that the findings of fact were intended to be so arranged and set forth in the report of the commission that they could be offered as *prima facie* evidence of "each and every fact found," unaccompanied with extraneous, embarrassing or incompetent matter calculated to confuse or mislead. Int. C. C. *v.* Louisville & N. R. Co. 75 Fed. 409, 414-415. While not expressing the opinion that findings of fact even when mixed with incompetent matter should in all cases be excluded, we hold that, if the same be received,
503 the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the matter be wholly disregarded. Unless this course be pursued the parties are deprived at least in part of the benefits or safeguards intended to be secured to them under the constitutional guarantee of trial by jury. In omitting in the present instance to

follow such method we think there was error and that the assignments must be sustained.

There are other assignments of error in each of the two actions of the same general nature as those already considered, to which it is unnecessary particularly to allude. If the matter rested here, while a judgment of reversal would be necessary, it would be accompanied with a direction for a writ of *venire facias de novo*. But there are other assignments requiring our attention.

In each of the two actions there are assignments of error to the following portion of the charge to the jury:

"The questions you are to ascertain are to be passed upon by you under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this Interstate Commerce Commission."

The orders referred to in this instruction included the order of reparation specifying the sum for which action was brought. The statement that the commission "may or may not have been justified in making their orders" was directly calculated to impress the
504 jury with an idea that the lawfulness or unlawfulness of the order of reparation was a wholly immaterial consideration and should in no way be permitted to influence its deliberations in reaching a verdict. This portion of the charge gives rise to two questions; first, whether it was necessary to a recovery that the order of reparation should have been lawful in whole or in part, and, if so, secondly, whether relief not lawfully embraced in such order could be obtained by the plaintiff below. Section 9 of the interstate commerce act provides, among other things, as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

The plaintiff elected the method of procedure by complaint to the commission, and thereafter was confined to that remedy. One of the objects designed to be accomplished by such procedure is the making in a proper case of an order of pecuniary reparation. To this end the commission is clothed with authority to compel that attendance of witnesses and the production of evidence. It is true that the commission is without power to enforce such an order, and, unless it be voluntarily obeyed by those to whom it is directed, resort to judicial

proceedings is necessary to obtain the relief covered by it. But that such relief may be obtained the order must be lawful. It is not sufficient that it be within the jurisdiction of the commission,
505 if it be unlawful. The phrase "lawful order," as employed in section 16 as amended, implied more than the exercise of mere jurisdictional power of authority. In Int. Com. Com. *v.* Alabama Midland R'y, 168 U. S. 144, 159, distinguished counsel contended:

"The words 'lawful order' mean an order the Commission has jurisdiction to make. An order may be lawful and at the same time erroneous, so that if the Commission made an order in a matter over which they had jurisdiction, which was merely an error of judgment as to precisely the degree of reparation, for instance, the carrier ought to make, the order would still be lawful."

The court, however, with respect to this contention said:

"The first contention we encounter, upon this branch of the case, is that the Circuit Court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the court is only authorized to inquire whether or not the Commission has misconstrued the statute and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact and not of power, and hence unreviewable. We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court is invoked by the Commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises. * * * It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal, in such cases, that they are not restricted to the evidence adduced before the Commission, nor to a consideration merely of the power of the Commission to
506 make the particular order under question, and that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence."

It is essential that the order be warranted by the provisions of the act in connection with the principles of law involved in the proper application of these provisions to a given case. Not only must an order of pecuniary reparation be lawful, but no recovery by judicial proceedings under section 16 as amended can exceed, aside from interest and costs, the amount required by such order to be paid, nor be had for any cause not presented to the commission in the proceedings in which such order is made. It is incumbent on one claiming damages against a common carrier for alleged violation of the act, and electing to proceed by complaint to the commission, to apply to that body by petition briefly stating the facts. Thereupon a statement of the charges so made is forwarded by the commissioner to the carrier, who is called upon "to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission." If the carrier within the specified time makes reparation

for the alleged injury, such carrier is wholly relieved from liability to the petitioner for the violation of law complained of. If, however, the carrier does not "satisfy the complaint" within the specified time it becomes the duty of the commission "to investigate the matters complained of." It is only because the carrier fails to satisfy the complaint that an investigation by the commission of the "matters complained of" is had. The regular course in conducting the investigation, save in exceptional cases not included in those now under consideration, is to take evidence only "after a cause or proceeding is at issue on petition and answer." In cases No. 153 and No. 154 this course was pursued.

If on investigation it appears to the satisfaction of the Com-
507 mission by the testimony of witnesses or other evidence that a violation of law cognizable by that body has been committed by a common carrier whereby "injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation," the commission is authorized, and it is its duty, forthwith to "cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission." If within that time it appears to the commission that such carrier has ceased from such violation of law and has made reparation for such injury or damage "in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law." It is only in case the carrier, having failed to satisfy the party or parties complaining, "shall violate or refuse or neglect to obey or perform" a lawful order of pecuniary reparation, that an action will lie for the recovery of the reparation so ordered, and it is necessary that the petition shall allege "such violation or disobedience as the case may be." To undertake to determine whether one, in suing for pecuniary reparation lawfully ordered by the commission, proceeds, on the one hand, for the enforcement of the lawful order of reparation, or, on the other, for the recovery of the reparation lawfully ordered, were to indulge in unprofitable refinement. It is enough for present purposes that in either view the substantial object of the action is the obtaining of reparation lawfully ordered to be paid. The law allows
no appeal from a decision of the commission denying or
508 awarding reparation, nor does a writ of error lie in such case.

The lawfulness of an order of reparation does not necessarily depend upon a sufficiency of evidence adduced before the commission, but upon the existence of facts, whether or not disclosed to that body, warranting the reparation ordered; and in an action brought to obtain such reparation it is enough that such facts be established by proper evidence. Hence in such an action the parties are not confined to the evidence adduced before the commission during the investigation resulting in the order of reparation. They are at liberty

either wholly or partially to rely upon the "finding of fact," made by the act *prima facie* evidence in any judicial proceeding "as to each and every fact found," or resort may be had by them or any of them to cumulative or other evidence. Int. Com. Com. *v.* Alabama Midland Ry., 162 U. S., 144, 175. Texas & Pac. Railway *v.* Interstate Com. Com. 162 U. S., 184, 196. Kentucky &c. Co. *v.* Louisville & N. R. Co., 37 Fed. 567, 614. Int. Com. Com. *v.* Lehigh Val. R. Co., 49 Fed. 177. Int. Com. Com. *v.* Atchison &c. R. Co. 50 Fed. 295. Int. Com. Com. *v.* East Tenn. &c. Ry. Co. 85 Fed. 107, 110. Int. Com. Com. *v.* Cin. &c. Ry. Co., 56 Fed. 925. The cause of action is examined *de novo* and the proceeding is in a qualified sense independent of the investigation by the commission. Detroit &c. Ry. Co. *v.* Int. Com. Com. 74 Fed. 803, 839. Kentucky &c. Co. *v.* Louisville & N. R. Co., 37 Fed. 567, 615. Shinkle, Wilson & Kreis Co. *v.* Louisville & N. R. Co., 62 Fed. 690, 693. Int. Com. Com. *v.* Cin. &c. Ry. Co. 56 Fed. 925. The commission in making an order of reparation may have been actuated by insufficient or erroneous reasons and the order nevertheless be valid if it be within the scope of the complaint made to that body. Int. Com. Com. *v.* Southern Pac. R. Co., 132 Fed. 829, 837. Int. Com. Com. *v.* East Tenn. & C. Ry. Co. 85 Fed. 107, 110. In the latter case the court said with
509 respect to an erroneous ground upon which the commission based its order:

"In this undoubtedly it was in error. The contrary doctrine is now well established. But this error is not material. The legal reason given may be wrong and the order right if, upon the facts, the latter should be found by the court to be warranted by law. Nor would it affect the duty of the court if the commission had founded its order upon one provision of the act, and the facts brought the case within some other. The question, therefore, is whether the order made was a lawful one in the circumstances as they are made to appear."

But the cause of action in a suit brought for the recovery of pecuniary reparation must have been included in the order of reparation and have constituted the whole or part of the basis of such order. Int. Com. Com. *v.* Louisville & N. R. Co. 75 Fed. 409, 413, 428. Detroit &c. Ry. Co. *v.* Int. Com. Com. 74 Fed. 803, 840-841. Int. Com. Com. *v.* Delaware, L. & W. R. Co., 64 Fed. 723. New York & N. Ry. *v.* New York & N. E. R. Co., 50 Fed. 867, 870. Int. Com. Com. *v.* Detroit Railway Co., 57 Fed. 1005, 1008, 1013. We do not perceive either on the authorities or on principle, with respect to the necessity that the substantive relief to be obtained, aside from interest and costs, should have been included in the order of the commission, any distinction between a suit in equity to enforce obedience to an order that a carrier shall desist from acts in contravention of the statute, and an action at law to recover pecuniary reparation where complaint has been made to the commission. This conclusion not only is a reasonable inference to be drawn from the various provisions of the act adverted to but is supported by other considerations. That the findings of fact by the commission on which its order for pecuniary

reparation is founded should have been made *prima facie* evidence in an action for the recovery of such reparation is strongly
510 indicative of a legislative intent that the demand for such reparation sought to be enforced in such action must be confined to such reparation as was considered by the commission and included in its order. In Cin. N. O. & Tex. Pac. Ry. *v.* Int. Com. Com., 162 U. S., 184, 196, the court said:

"The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the Commission. * * * The purposes of the act call for a full inquiry by the Commission into all the circumstances and conditions pertinent to the questions involved."

Further, the fact that where a remedy is sought for the recovery of damages resulting from a violation of the provisions of the act there must be an election between procedure by complaint to the commission and procedure by suit or action in the proper court, leads to the same conclusion. Both remedies cannot be pursued either contemporaneously or successively. To permit the recovery, in an action brought for violation of or disobedience to an order of pecuniary reparation, of damages not included in such order would involve judicial sanction of a virtual blending of both remedies in palpable disregard of the provision that the petitioner "shall not have the right to pursue both of said remedies," but must in such case make an election between the two. We think there was substantial error in the portion of the charge just considered.

In each of the two actions error has been assigned by each of the defendants to the refusal of the court to charge the jury that
511 there could be no recovery against them respectively. In addition to this general assignment there was a specific assignment by the Lehigh Valley Railroad Company to the following portion of the charge in action No. 23:

"On the part of the Lehigh Valley Railroad Company, it is shown that on February 11, 1892, it leased its road to the Philadelphia & Reading Railroad Company, which latter continued to operate it under said lease until August 1, 1893. It is claimed on behalf of said road that for such period no damages can be found against it or recovered from it. In view of the fact that under the lease in question the Lehigh Valley Railroad Company was to be paid by the Reading Company a percentage on the gross earnings of the road during the lease, we are of opinion that the Lehigh Valley Railroad Company was not exempt from liability during the lease, if it was chargeable in other respects, and the plaintiff is entitled to recover against it in other respects. In view, however, of the admission of counsel for plaintiff that they have shown no shipments during said period and claim no reparation for such,

it will be apparent to you that the question as to the giving of this lease need not concern the jury, and so I instruct you."

Section 8 of the act provides, among other things, as follows:

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act."

On the assumption that the conduct of and relationship between the defendants with respect to the through route from the oil regions in Pennsylvania to New York Harbor points, including
512 Perth Amboy, were of such a character as to render all of them personally liable for the exaction by the initial carrier, or other defendants, of excessive and unjust freight charges, such liability on the part of any defendant would, save under exceptional circumstances, be confined to exaction occurring during the co-operation of that defendant with the others. In the absence of such special circumstances, we are not aware of any principle or ground on which one of the common carriers would incur liability on account of the exaction of illegal charges by other common carriers over the through route during a period when the former carrier was not co-operating with the others. Section 1 in defining the word "railroad" as employed in the act, certainly does not countenance such an idea of liability. So far as material in this connection, it provides that "the term 'railroad' as used in this act shall include * * * all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease." It appears from the record that there was evidence before the commission and also before the court below that part of the amount included in the order of reparation sued on, and in the judgment, represented alleged illegal exactions of freight charges received while the Philadelphia and Reading Railroad Company was operating a portion of the through route under a lease from the Lehigh Valley Railroad Company. This fact is disclosed by the report of the commission of October 22, 1895, exhibit H, in connection with the copy of the lease set forth in the record. The commission said:

"On July 12, 1895, counsel for the defendant, the Lehigh Valley Railroad Company, suggested to the Commission, by the filing of an affidavit of John R. Fanshawe and copy of a lease of the
513 Lehigh Valley Railroad to the Philadelphia and Reading Railroad Company, that for the period between February 11, 1892, and August 1, 1893, (a portion of the time covered by these reparation claims) the Lehigh Valley Railroad was operated by the Philadelphia and Reading Railroad Company, as lessee under the terms of a lease bearing date first mentioned; and that during such time, the receipts from the operation of the Lehigh Valley road enured to and were received by the Philadelphia and Reading Railroad Company, and were not received by the defend-

ant, the Lehigh Valley Railroad Company. Though the Philadelphia and Reading Company, as lessee, would be liable for injuries inflicted during its management of the road, that company is not a party to these proceedings. It is understood that the Lehigh Valley Railroad Company resumed operation of its properties under a clause in the lease providing for its termination at the option of the lessor company, in the event of the termination, for any reason whatsoever, of a certain agreement of even date therewith between the Lehigh Valley Coal Company and the Philadelphia and Reading Coal and Iron Company. There is thus raised in these proceedings the question whether the lessor company is liable to respond in damages to parties injured through non-performance of public duties as a common carrier during the operation of its railroad property by a lessee. * * * The Lehigh Valley Railroad Company, a common carrier subject to the provisions of the Act to Regulate Commerce, could not, by leasing its road, free itself from liabilities for practices made illegal by that statite; nor after resuming operation of its property pending proceedings against it to enforce statutory provisions so violated and to recover damages for injuries sustained under such violations, can it claim exemption from liability during the term of the lease."

Further, in Cattle Raisers' Association *v.* Railway Com-
514 pany, 7 I. C. C. R., 513, 537, which report by virtue of section 14 is made "competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States * * * without any further proof or authentication thereof," the commission referring to cases No. 153 and No. 154, said:

"In the matter of the Independent Refiners' Association, the Lehigh Valley Railroad was engaged in the discriminating practices complained of, and leased its road for a short time to the Philadelphia & Reading Railroad Company, by whom the practices were continued. Upon the termination of the lease the Lehigh Valley resumed possession of its property and still continued the same discrimination. The Commission held that the Lehigh Valley Company was liable for damage accruing to shippers by these unlawful practices during the period of the lease."

It does not appear that the Philadelphia and Reading Railroad Company was, by virtue of the lease or otherwise, a partner, agent or representative of the Lehigh Valley Railroad Company during the time the former company was operating a portion of the through rout-s under the lease, with respect to any benefit derived or to be derived through the exactions by it or any of the defendants of freight charges. Nor did the exaction during that time by the legislatively sanctioned lessee or any of the defendants, other than the lessor, of illegal freight charges, assuming them to have been such, belong to the category of torts for which the lessor could be held liable. The amount of such charges, though included, is not specified either in the order of reparation or in the judgment. Both were entire and *in solido* against all the defendants. Whatever may have been the amount of such charges, it is inseparable and indistinguish-

able from the balance of the sum ordered by the commission and adjudicated by the court below. The order was, therefore, for
515 all practical purposes ineffective, and must be treated as unlawful and the judgment erroneous. But little need be said of the "admission of counsel for plaintiff that they have shown no shipments during said period and claim no reparation for such." There was uncontradicted evidence that there were shipments during that period and that the order of reparation, for the whole amount of which judgment was rendered, included alleged illegal freight charges in such period. While it was competent for the counsel for the plaintiff to admit away or waive the rights of their client, it was beyond their power to admit away or waive the right of the defendant to a valid defence. Further, the Philadelphia and Reading Railroad Company was not made a party either to the proceedings before the commission or to the action in the court below. It has never had its day in court. Whatever amount of alleged illegal freight charges may have been directly or indirectly exacted by it while operating a portion of the through route was assessed in proceedings to which it was a stranger, and in which it had no opportunity to make defence. It, certainly, could not be concluded by the judgment; and that judgment, being entire, may be prejudicial to all the defendants therein with respect to the amount—whatever it may have been—included therein on account of freight charges by the Philadelphia and Reading Railroad Company. In the portion of the charge now under consideration we think there was error.

In each action error has been assigned to the following portion of the charge to the jury:

"In regard to the defendants, Samuel G. De Coursey, Receiver, and the Western New York and Pennsylvania Railway Company, it appears that the original company (that is, the Western New York and Pennsylvania Railroad Company), against which this petition was originally filed on December 4, 1888, went into the hands of Samuel G. De Coursey, as Receiver, on April 1, 1903. Prior thereto, to wit, on the 14th day of November, 1892, an order was made
516 by the Interstate Commerce Commission against the Western New York and Pennsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation. It is alleged (and upon this point we express no opinion, for you will notice that we leave some facts to be found by you), that thereafter, to wit, on the 22nd day of October, 1895, an order was made against the Receiver, Samuel G. De Coursey, among others, directing him, as Receiver of the road, and the Western New York and Pennsylvania Railroad Company, to make reparation to the plaintiff of a specific amount which has been read in evidence before you. It is alleged that during this proceeding to thus ascertain the amount of reparation to be made, the Receiver was represented by counsel and took part in those proceedings and resisted the entry of the making of such an order. It is also alleged that he was notified of this order of reparation and declined to comply with the same. If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against

the Western New York and Pennsylvania Railroad Company, the original company, in other respects, and that the said railroad company united as explained above in making a through joint rate with the New York, Lake Erie and Western Railroad Company and the Delaware and Hudson Canal Company, and in so doing subjected refined oil in barrels to an undue and unreasonable prejudice or disadvantage, and that when the company ceased to operate its road and it passed into the hands of Receiver, such Receiver continued to maintain such rate and declined to obey the desisting and reparation orders, and continued the litigation, then we are of opinion that by such acts and the adoption of the rate, the Receiver, as Receiver, had so acted that he should not be exempt from the verdict that
517 this jury might find, if in other respects the plaintiff is entitled to recover a verdict. And as, under the decree of this court, under which this road was sold to the Western New York and Pennsylvania Railway Company, the said company was made liable for liabilities incurred by the Receiver, we instruct you that if the plaintiff is entitled, under the foregoing instructions, to a verdict against the Receiver, the jury should be warranted in also rendering a verdict against the Western New York and Pennsylvania Railway Company."

It appears that the Western New York and Pennsylvania Railroad Company operated its portion of the through route from a date prior to September 3, 1888, until about April 1, 1893, when its property and affairs passed into the hands of De Coursey as receiver appointed by the circuit court of the United States for the western district of Pennsylvania, that the Receiver continued to operate the portion of the through route in his hands as receiver from his appointment until March 31, 1895, when the property of the Western New York and Pennsylvania Railroad Company was acquired by the Western New York and Pennsylvania Railway Company by virtue of a judicial sale under an order of the court having jurisdiction of the cause. The order of sale provided as follows:

"Such sale to be subject, however, to all executory contracts made by the Receiver in this suit under the authority of the Court, of which contracts the Receiver is directed to give the trustee a full and accurate statement; and subject also to all the debts and liabilities of the Receiver and to all after-maturing interest upon the first-mortgage bonds and all car-trust obligations and equipment notes now outstanding; such debts and liabilities, if any, will remain a lien upon the premises until discharged."

In each action the order of reparation in a lump sum is di-
518 rected against the Western New York and Pennsylvania Railroad Company, De Coursey as receiver thereof, and the Western New York and Pennsylvania Railway Company, the purchaser, besides others. So far as the purchaser is concerned, the words "all the debts and liabilities of the receiver," in the order of sale, do not include all the debts and liabilities of the Western New York and Pennsylvania Railroad Company, for, as stated by Mr. Justice Miller in Hoard *v.* Chesapeake and Ohio Railway, 123 U. S., 222, 227, "if, as such purchasers, they thereby became bound to pay all

the debts and perform all the obligations of the corporation whose property they bought, it would put an end to purchases of railroads." The order specifies that the sale should be subject to all executory contracts made by the receiver by authority of the court, all after maturing interest upon the first mortgage bonds and car-trust obligations, and equipment under then outstanding; but the debts and liabilities of the receiver, which, with the items above mentioned, were to remain "a lien upon the premises until discharged" were manifestly debts and liabilities incurred by the receiver as such, and not by the Western New York and Pennsylvania Railroad Company. To hold the purchaser liable for them would involve a departure from the order of sale, and charge it with an unascertained portion of the alleged illegal overcharges for which it was in nowise responsible. With respect to the receiver, it may be said, that, aside from the act of March 3, 1887 (24 Stat. 552), the allowance and enforcement of such a claim against a receiver as such is within the jurisdiction of the court appointing him and entertaining the receivership proceedings, although such court, if the facts be disputed, may in a proper case either of its own motion or at the instance of the parties alleging damage, or any of them, allow the receiver to be sued in a court of law or direct the trial of an issue to settle the facts.

Barton *v.* Barbour, 104 U. S. 126. Porter *v.* Sabin, 149 U. S.
519 475, 479. Section 3 of the act just mentioned provides:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with *cush* property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

In the case of *In re* Tyler, 149 U. S. 164, 182, the court said:

"While the third section of the act of Congress of March 3, 1887, 24 Stat. 552, C. 373, now permits a receiver to be sued without leave, it also provides that 'such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.' Neither that nor the second section, which provides that the receiver shall manage the property 'according to the valid laws of the State in which such property shall be situated,' restricts the power of the Circuit Court to preserve property in the custody of the law from external attack."

It is, therefore, clear that the function of an action against a receiver in his official capacity, brought without leave of the court appointing him, to recover damages for an alleged tort committed by him while acting in such capacity, is to establish the amount of the plaintiff's claim, but in nowise to interfere with the custody, control and disposition by the court of the property of which it has taken possession in the receivership proceedings. Execution upon
520 a judgment recovered in such an action cannot be enforced or legally issue against the property *in custodia legis*, and,

consequently, the receiver as such not be joined with others against whom the judgment would constitute a personal liability to be enforced by execution at law. We think there was error in the portion of the charge just discussed.

In action No. 25 error has severally been assigned by the Erie Railroad Company to the refusal of the court below to give two instructions to the jury. They may be considered together and are as follows:

"That it appears that this defendant had no participation in any of the acts for which recovery is sought in this proceedings and in fact at the time of the commission of the alleged acts had not been incorporated. That if any alleged liability on its part is to be enforced, on the ground of any assumption by it, it can only be done in accordance with the reservation of the foreclosure decree, by an intervention in the foreclosure suit in the circuit court of the United States for the southern district of New York, the court of primary jurisdiction in the foreclosure suit, and therefore, your verdict should be for this defendant.

That by the decree of foreclosure in the suit in which the defendants, McCullough and Thomas, were appointed Receivers of the New York, Lake Erie and Western Railroad Company, it was expressly provided that all claims against the Receivers and all claims against the said Railroad Company entitled to priority over the mortgage should be presented for allowance and filed within six months after the publication by the Receivers of a notice to holders of such claims to present the same for allowance, and that any claims which should not be so presented or filed within such period of six
months should not be enforcible against the Receivers, or
521 against the property, or against the purchaser, or purchasers, or their successors or assigns. That the Receivers caused such a notice to be published, as provided in said decree, and that the claim set up in the petition was not presented or filed within the period fixed by the said decree and such notice, and therefore, your verdict should be for this defendant."

It appears from the record and is not disputed that the property of the New York, Lake Erie and Western Railroad Company, one of the defendants, went into the hands of the defendant McCullough and John King, as receivers, in the latter part of July, 1893, by virtue of proceedings in the circuit court of the United States for the southern district of New York and in the circuit court of the United States for the western district of Pennsylvania; that King, having resigned from the receivership, the defendant Thomas became receiver in his stead on or about May 1, 1895; that the receivers continued in possession and operation of the line of the New York, Lake Erie and Western Railroad Company, forming a portion of the through route referred to in the action below, from the latter part of July, 1893, until December 1, 1895; and that meanwhile the property, including that line, was sold under foreclosure proceedings, hereinafter more particularly referred to, and the purchasers conveyed title to the then newly created and organized Erie Railroad Company, which took possession of it December 1, 1895,

and has since continuously operated it. Proceedings having been instituted on or about June 15, 1895, in the circuit court for the southern district of New York, and on or about July 1, 1895, in the circuit court for the western district of Pennsylvania, for the foreclosure of the second consolidated mortgage of the New York, Lake Erie and Western Railroad Company, dated October 3, 1878, and covering its line, and having been consolidated with the receivership proceedings, a decree of foreclosure and sale was made in each
522 court in the latter part of August, 1895. The Erie Railroad Company did not exact or co-operate in exacting any of the alleged overcharges for which the order of reparation was made. These alleged exactions covered the period from September 3, 1888, to May 15, 1894. The order of reparation was made October 22, 1895. The Erie Railroad Company was not in existence until November, 1895, and did not operate the line of the New York, Lake Erie and Western Railroad Company before December 1, 1895. If, then, the Erie Railroad Company, prior to the commencement of the action below, became personally liable for the amount or any portion of the amount included in the order of reparation, such liability must have resulted from the judicial proceedings for the appointment of receivers and the foreclosure of the mortgage and the sale and conveyance of the property thereunder, or have been voluntarily assumed by it and by the deed executed to it pursuant to those proceedings, or in some other manner wholly undisclosed by the record. Hoard *v.* Chesapeake and Ohio Railway, 125 U. S. 222, 227. Doubtless, under certain circumstances, and within reasonable limits, personal liability properly may be fastened by judicial decree upon a purchaser, taking title under a foreclosure sale, for the contracts or torts of the defendant in the decree prior to the commencement of the proceedings, or of the receivership while operating the property which is the subject of the foreclosure and sale. But, aside from the deed to be adverted to later, does the record disclose any liability, personal or otherwise, on the part of the Erie Railroad Company for any portion of the amount included in the order of reparation, by reason of any judicial proceedings against the New York, Lake Erie and Western Railroad Company? The decree of foreclosure and sale in the southern district of New York, which was substantially similar to that in the western district of Pennsylvania contained, among other things, the following provisions:

523 "The purchaser or purchasers shall as part consideration and purchase price of the property purchased, and in addition to the sum bid, take the same and receive the deed therefore upon the express condition that he or they or his or their successors or assigns shall pay, satisfy and discharge any unpaid compensation which shall be allowed by the court to the Receivers, and any indebtedness and obligations or liabilities which shall have been contracted or incurred by the Receivers, or which may be contracted or incurred by the Receivers before delivery of possession of the property sold, whether or not represented by certificates hereafter issued, and also any indebtedness or liabilities contracted or incurred by

said defendant railroad company in the operation of its railroad prior to the appointment of the Receivers, which are prior in lien or superior in equity to said second consolidated mortgage, and which shall not be paid or satisfied out of the income of the property in the hands of the Receivers, upon the court adjudging the same to be prior in lien or superior in equity to said mortgage and directing payment thereof. * * * In the event that said purchaser or purchasers shall refuse after demand made to pay any of the before mentioned indebtedness, obligations or liabilities, the person holding the claim therefor may, upon fifteen days' notice to said purchaser or purchasers, their successor or successors, assign or assigns, file his petition in this Court to have such claim enforced against the property aforesaid in accordance with the usual practice of this Court in relation to claims of a similar character; and such purchaser or purchasers, and his and their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, but either party shall have the right to appeal from any judgment,
524 decree or order made thereon. And jurisdiction of this cause is retained by this Court for the purpose of enforcing the foregoing provisions of this decree. * * * The Receivers shall prior to the sale hereunder and as soon as practicable, file with the Clerk of this Court a statement showing as definitely as practicable all indebtedness, obligations and liabilities contracted or incurred by them remaining unpaid, and shall within two weeks prior to the time of sale file with the Clerk of this Court a further statement showing as definitely as they shall find practicable, any additional indebtedness, obligations or liabilities contracted and incurred, and outstanding, and also the amount of the indebtedness, obligations and liabilities included in such first statement which may have been discharged; but nothing contained in any such statements shall be binding upon the purchaser or purchasers at said sale. Any such claims for indebtedness, obligations or liabilities which shall not have been included in such statements of the Receivers, or which shall not have been presented in writing to the Receivers or filed with the Clerk of said Court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the Receivers of a notice to the holders of such claims to present the same for allowance. The Receivers shall publish such notice at least once a week for the period of six weeks in one or more newspapers published in * * * upon the request of any purchaser or purchasers after delivery of possession of the property to the purchaser, and any such claims which shall not be so presented or filed within the period of six months after the first publication of such notice shall not be en-
forceable against said Receivers nor against the property sold
525 nor against the purchaser or purchasers, his or their successors or assigns. Any such purchaser or purchasers, and his or their successors and assigns shall have the right to enter his or their appearance in this Court, and he or they, or any of the parties to this suit, shall have the right to contest any claim, demand or

allowance existing at the time of the sale and then undetermined, and any claim or demand which may arise or be presented thereafter which would be payable by such purchaser or purchasers, his or their successors or assigns, or which would be chargeable against the property purchased, in addition to the amount bid by such purchaser or purchasers at the sale, and may appeal from any decision relating to any claim, demand or allowance according to the law and practice of said court."

Pursuant to the decree of sale, the property of the New York, Lake Erie and Western Railroad Company in the hands of the receivers, was sold by a special master November 6, 1895, to Charles H. Coster, Lewis Fitzgerald and Anthony J. Thomas; and the circuit court of the United States for the southern district of New York made a decree November 9, 1895, confirming the sale, in which, after reciting that the sale was subject to the "mortgages, receivers' debts and other preferential liens and claims, and to all and singular the terms and conditions in said decree set forth," it was said:

"The same is, in all things ratified, approved, confirmed and made absolute, subject, however, to all the mortgages, receivers' debts and preferential claims and to all equities reserved and to all and singular the conditions of purchase as recited in such decree, and the continued right of the Court to adjudge and declare what Receivers' or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed, or ought to be paid out of such proceeds of sale in preference to the mortgage bonds;
526 and this Court expressly reserves for future adjudication and power thereby to bind the property sold, all liens, claims and equities specified in and reserved by the said final decree of foreclosure so as aforesaid entered on August 21, 1895."

After accepting Coster, Fitzgerald and Thomas as purchasers and as such bound to comply with the orders of the court, the decree of confirmation provided as follows:

"That each and every obligation on account of such purchasers may be transferred to and assumed by the new corporation to be formed by them under the Railroad Law of the State of New York as successor to the said the New York, Lake Erie and Western Railroad Company. * * * And the court further reserves full power from time to time to enter orders binding upon such purchasers or their said transferee, requiring them to pay into the registry of the court all such sums as have been or may be ordered by the Court for the payment of any and all Receivers' debts or claims adjudged or to be adjudged as prior in lien or equity to the mortgage herein foreclosed, or entitled to preference in payment out of the proceeds of sale."

The court also reserved "full power notwithstanding such conveyance and delivery of possession to retake and resell the property" if the purchasers or the new corporation as their transferee, should fail to pay into court all sums thereafter ordered to be so paid to discharge "any and all such debts, liens or claims as it may decree ought to be paid out of the proceeds of sale in preference to the mortgage herein foreclosed." The record does not disclose any

personal liability on the part of the Erie Railroad Company enforcible in the action below for the payment of the whole or any portion of the pecuniary reparation ordered by the commission,
bu virtue of the foreclosure proceedings or the judicial con-
527 firmation of the sale thereunder, or either of them. The property of the New York, Lake Erie and Western Railroad Company was decreed to be sold subject to the condition that the purchasers or their assigns should pay, satisfy and discharge (1) any unpaid compensation to be allowed to the receivers, (2) "any indebtedness and obligations or liabilities" which should have been contracted or incurred by the receivers before the delivery of possession of the property sold, (3) "any indebtedness or liability contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of the receivers, which are prior in lien or superior in equity to said second consolidated mortgage, and which shall not be paid or satisfied out of the income of the property in the hands of the receivers, upon the court adjudging the same to be prior in lien or superior in equity to the said mortgage and directing payment thereof." There was a general provision, applicable to all of the above clauses, to the effect that in case of refusal by the purchasers or their assigns, after demand, to pay "any of the before mentioned indebtedness, obligations or liabilities," the "person holding the claim therefor" might after fifteen days' notice to the purchasers or their assigns file his petition in the court entertaining the foreclosure proceedings "to have such claim enforced against the property aforesaid in accordance with the usual practice of this court in relation to claims of a similar character," and that "jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree." The decree of confirmation states that the sale was subject to "all and singular the terms and conditions in said decree set forth," and, more specifically, (1) to "mortgages, Receivers' debts and preferential claims," (2) to "all equities reserved and to all and singular the conditions of purchase as recited in said decree" and (3) to "the con-
528 tinued right of the court to adjudge and declare what Receivers' or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed, or ought to be paid out of such proceeds of sale in preference to the mortgage bonds;" the court reserving "for future adjudication and power thereby to bind the property sold all liens, claims and equities specified in and reserved" by the decree of foreclosure and sale. In addition to the reservation of power just mentioned, the court reserved power (1) to require the Erie Railroad Company "to pay into the registry of the court all such sums as have been or may be ordered by the court for the payment of any and all Receivers' debts or claims adjudged or to be adjudged as prior lien or equity to the mortgage herein foreclosed, or entitled to preference in payment out of the proceeds of sale," and (2) to resell the property sold if the Erie Railroad Company failed to pay into court all sums thereafter ordered to be paid to discharge "and *and* all such debts, liens or

claims as it may decree ought to be paid out of the proceeds of sal
in preference to the mortgage herein foreclosed." It is clearly t
be gathered from the provisions of the decree of foreclosure an
confirmation that no personal liability, if, indeed, any liability
arising from a mere tort whether of commission or omission, o
the part of the New York, Lake Erie and Western Railroad Com
pany or its receivers, was intended to be enforcible against the Eri
Railroad Company as purchaser, until after such personal liabilit
should be adjudged, established and allowed in the exercise of th
power reserved to the court in the foreclosure proceedings. Bu
it does not appear that any portion of the reparation ordered b
the commission was adjudged, established or allowed in connectio
with those proceedings. The deed from the purchasers to the Eri
Railroad Company was offered by the counsel for the plaintiff a
"made in pursuance" of the decree of sale and, while th
529 record does not disclose a copy of the entire deed, it fairl
may be assumed that it referred by recital or otherwise t
the terms and conditions in those decrees pursuant to which it wa
made. Its language must, therefore, be read in the light of thos
terms and conditions. If, aside from all assignments of error othe
than those under immediate consideration, the Erie Railroad Com
pany could be held personally liable for the exaction of allege
unlawful overcharge by the New York, Lake Erie and Weste
Railroad Company, or its receivers, the ground must be that by th
execution by the Erie Railroad Company of the deed in the for
closure proceedings it voluntarily assumed such liability. An
supposition that the Erie Railroad Company intended by executin
the deed to become pecuniarily liable for other purposes and othe
wise than provided for in the decrees of foreclosure and confirma
tion, or that the other parties to the deed intended that there shoul
be such a departure in it from these decrees, is so unreasonabl
as to be inadmissible in the absence of clear and convincing languag
unmistakably disclosing such intent. We find no such languag
in the portions of the deed spread upon the record. The dee
provided that the property thereby conveyed should be "subjec
also, to the lien and charge of all liens and incumbrances prio
or superior to the mortgage herein above mentioned, and * *
subject to all indebtedness of the said Receivers as such, incurre
or to be incurred by them during their receivership and remainin
unpaid, which said indebtedness is, by the judgment aforesai
charged upon the mortgaged premises as a lien prior to the mor
gage hereinabove mentioned; it being the true intent and mean
ing of these presents that all and singular the liabilities incurre
by, or enforceable against the said Receivers, of every nature an
description, arising out of any acts done or omitted to be don
530 by them, in good faith, as such liabilities now exist, or ma
at any time hereafter be established, or against any propert
hereby conveyed, or against them on account of such conveyanc
do and shall constitute a lien and charge upon all and singula
the premises hereby conveyed to the party of the second part, a
fully, to all intents and purposes, as such liabilities, or any of them

would or could constitute such lien or charge upon the said premises, had the same or any part thereof continued to remain in the hands, possession and custody of the said John G. McCullough and Eben B. Thomas, Receivers, and the said lien and charges hereby created and declared shall rank in order of priority before any future or subsequent lien or charge that may be created and imposed upon the premises, or any part thereof, by the said party of the second part, in any manner or form whatsoever; and the said lien or charge hereby created and declared, or any claims to any specific part or portion of the premises under or by virtue of title paramount, is hereby declared to be, and the same shall be, enforceable against the said party of the second part, in the same manner and to the same extent that the same might have been enforced against the said John G. McCullough and Eben B. Thomas, if they had continued to be such Receivers in actual possession of the premises."

Certainly down to this point the deed does not show an assumption by the Erie Railroad Company of any personal liability on its part for any more tort of omission or commission by the New York, Lake Erie and Western Railroad Company. The deed proceeds:

"In consideration whereof, the said Erie Railroad Company, party of the second part does hereby covenant and agree, to and with the said parties of the first part, their successors and assigns, that it will truthfully and truly assume, fulfill and perform on its part each and every of the liabilities above referred to, what-
531 ever form or nature thereof, and will pay off and discharge all the liabilities and indebtedness or liabilities incurred, or to be incurred, by said Receivers, and charged upon the said mortgaged premises as herein above set forth, and will fully indemnify and save harmless the said Receivers, and each of them, from and against any such indebtedness or liabilities, and every part thereof, to whomsoever due, and from and against all cost, expenses or charges which may arise or accrue out of or concerning the same: Also, that it will assume, and it does hereby assume, all the acts of the said Receivers done by them at any time in the due execution of their office as such, and all liabilities aforesaid, and will at all times indemnify and save harmless the said John G. McCullough and Eben B. Thomas, Receivers, from and against all liability, damage, cost and expense rising or which may arise in any manner aforesaid."

By the above clause the Erie Railroad Company agreed to "fulfill and perform * * * each and every of the liabilities above referred to" and to "pay off and discharge all the liabilities and indebtedness or liabilities incurred, or to be incurred, by said Receivers and charged upon the said mortgaged premises as hereinbefore set forth," and to "assume all the acts of the said Receivers done by them at any time in the due execution of their office as such, and all the liabilities aforesaid." But unlawful overcharge exacted by the New York, Lake Erie and Western Railroad Company were not included in the "liabilities above referred to" or the "liabilities aforesaid;" nor is there any evidence that they were "charged upon the said mortgaged premises as hereinabove set *of*rth," or that

they arose "in any manner aforesaid." The deed further pr
ceeds:

"Also, that if any liability shall be in any manner establish
against the said John G. McCullough and Eben B. Thom
532 or either of them, individually, or as Receivers, as aforesai
for the payment of any claim or demand of whatsoev
nature, or any part of any claim or demand, legally or equitab
entitled to satisfaction out of any property or estate heretofore a
hereby granted or assigned, then that the said party of the seco
part will at once assume and pay any liability so established, a
will fully indemnify and save harmless the said John G. McCullou
and Eben C. Thomas therefrom, and from all loss, cost and dama
which may arise or accrue out of or concerning the same; the tr
intent of this clause being to require the said party of the second pa
always to take care of and pay any sum or sums of money which t
said McCullough and Thomas, as Receivers, have become liable fo
or which it may be established the said McCullough and Thomas,
Receivers, ought to pay or have paid out of any property and esta
which by this indenture are conveyed or assigned unto the said par
of the second part, and as fully to protect the said John G. McCu
lough and Eben B. Thomas, Receivers, as if they or either of the
had retained in their or his hands and possession funds and estate f
the satisfaction of any and all such claims and demands."

The record discloses no evidence that, prior to the action belo
the claim for alleged unlawful overcharges by the New York, La
Erie and Western Railroad Company was "in any manner esta
lished," in connection with the foreclosure proceedings or by a
court, against any person or property. The Erie Railroad Compa
agreed to assume "liability so established" or "which it may be
tablished" the receivers ought to pay or have paid ou- of the proper
conveyed. We are unable to perceive that the Erie Railroad Co
pany became liable either by the foreclosure proceedings or the de

for any overcharges which unlawfully may have been exact
533 by the New York, Lake Erie and Western Railroad Co
pany. Yet such alleged unlawful charges by that compa
are included in the judgment below which is *in solido* against
the defendants. It further appears that the receivers after the sa
under the decree of foreclosure duly caused six weeks' notice to
published for the presentation of claims within the period there
required, and it does not appear that the claim in controversy w
"presented in writing to the Receivers or filed with the Clerk of sa
Court" at any time prior to the action below. On the part of t
plaintiff there was an offer of incompetent evidence to show that t
claim in controversy was so presented. This evidence was admitt
against the objection of the Erie Railroad Company that it was i
competent, and its admission is specifically assigned by that co
pany as error. Under the terms of the decree such claim, if it ev
had legal existence, was not "enforceable against said Receivers n
against the property sold nor against the purchaser or purchasers,
his or their successors or assigns," and therefore not enforceab
against the Erie Railroad Company. We think there was substa

tial error in the matters to which the assignments last considered relate.

Error has been assigned by McCullough and Thomas, receivers of the New York, Lake Erie and Western Railroad Company, to the refusal of the court below to charge the jury as follows:

"That the defendants have duly accounted for all funds which came into their hands as such receivers and have been discharged by the order of the Circuit Court of the United States for the southern district of New York, which originally appointed them, and also by the order of this court, and, therefore, the verdict should be for these defendants."

The record shows that the receivers were finally and unqualifiedly discharged and released from all liability and their bonds
534 directed to be canceled, in the southern district of New York February 4, 1897, and in the western district of Pennsylvania February 19, 1897, more than four years before the bringing of the action below. There is no evidence of any vacation of these orders of discharge or either of them or of any application in that behalf. Under these circumstances McCullough and Thomas could not be held liable as receivers at the time the action below was brought. Lehman *v.* M'Quown, 31 Fed. 138. Davis *v.* Duncan, 19 Fed. 477. Farmers' L. & T. Co. *v.* Central R. of Iowa, 7 Fed. 537. Jesup *v.* Wabash, St. L. & P. Ry. Co., 44 Fed. 663, 665–666. Beach on Receivers, Secs. 725, 802. Smith on Receiverships, Sec. 286. Anderson on Receivers, sec. 586. The court below did not in its charge to the jury include in words or substance the instruction asked for. The receivers were entitled to it and there was error in denying it.

There are a number of assignments to portions of the charge, and to the refusal of instructions, touching the lawfulness or unlawfulness of the barrel package charges complained of. These assignments cannot be sustained. Whether a given transportation charge is just and reasonable, or unreasonable and excessive, is peculiarly a question for a jury. In Texas & Pac. Railway *v.* Interstate Com. Com. 162 U. S. 197, 219, the court said:

"The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality, and as there is nothing in the act which defines what should be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact."

We perceive no reason why the principle here enunciated should not be applicable to the terms "unjust and unreasonable" as employed in the first section. Upon the facts disclosed in the record
535 there may be room for a difference of opinion among intelligent men touching the justness and reasonableness of the alleged overcharges, and, were it not for error on other points, the question was properly left to the jury.

For the reasons hereinbefore given, and particularly in view of the invalidity of the orders of reparation on which both of the actions are based, and others we have not deemed it necessary to discuss, the judgment below in each of the two actions considered must be absolutely reversed, with costs; and it is so ordered.

Filed, May 1, 1905.

536 In the United States Circuit Court of Appeals for the Th
Circuit, October Term, 1905.

Nos. 2 and 3.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPA
and SAMUEL G. DE COURSEY, Receiver Thereof; THE WEST
NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and T
LEHIGH VALLEY RAILROAD COMPANY, Plaintiff- in Error,

v.

PENN REFINING COMPANY, LIMITED, of Oil City, Pennsylvania
Citizen of the State of Pennsylvania, Defendant in Error.

In Error to the Circuit Court of the United States for the West
District of Pennsylvania.

This cause came on to be heard on the transcript of record from
Circuit Court of the United States, for the Western District of Pe
sylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged
this Court, that the judgment of the said Circuit Court in this cau
be, and the same is hereby reversed with costs.

Philadelphia, May 2, 1905.

GEO. M. DALLAS,
Circuit Judge

537 In the United States Circuit Court of Appeals for the Th
Circuit, October Term, 1904.

Nos. 2 and 3.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPA
and SAMUEL G. DE COURSEY, Receiver Thereof; THE WEST
NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and T
LEHIGH VALLEY RAILROAD COMPANY, Plaintiff- in Error,

v.

PENN REFINING COMPANY, LIMITED, Defendant in Error.

In Error to the Circuit Court of the United States for the West
District of Pennsylvania.

And now, to wit, this sixteenth day of June A. D., 1905, it
ordered that Mandate issue to the said Circuit Court of the Uni
States, for the Western District of Pennsylvania in accordance w
the Opinion and judgment of this Court in said cause.

GEO. M. DALLAS,
Circuit Judge

538 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Western District of Pennsylvania, Greeting:

[SEAL.]

Whereas, lately in the Circuit Court of the United States for the Western District of Pennsylvania, before you or some of you, in a cause between the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof, the Western New York and Pennsylvania Railway Company and the Lehigh Valley Railroad Company, Plaintiffs in Error, against the Penn Refining Company, Limited, Defendant in Error, wherein the verdict of the jury and judgment of the said Circuit Court entered in said cause are in the following words, viz.:—

"We find for the plaintiff in the sum of twelve thousand seven hundred and six 92/100 ($12,706.92) dollars and so they all."

"And now to wit February 12th 1903, judgment is hereby entered upon the verdict in pursuance of the foregoing opinion."

539 as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of a Writ of Error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

540 And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and four, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause, be, and the same is hereby reversed with costs, and that the said defendants the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver thereof, the Western New York and Pennsylvania Railway Company and the Lehigh Valley Railroad Company, recover against the said Plaintiff the Penn Refining Company, Limited, Fifty-seven dollars and sixty cents for their costs herein expended and have execution therefor.

Philadelphia, May 2, 1905.

541 You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said Writ of Error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixteenth day of June, in the year of our Lord one thousand nine hundred and five.

Costs of Plaintiffs in Error.

Clerk $37.6
Attorney 20.0

$57.6

WM. H. MERRICK,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] U. S. Circuit Court of Appeals, Third Circuit. No 2 and 3. Oct. Term, 1904. Western New York and Penn'a R. R Co. *et al* Plaintiffs in Error *vs.* Penn Refining Company, Limited Mandate.

542 United States Circuit Court of Appeals, Third Circuit, Octo ber Term, 1904.

Costs of The Western New York and Pennsylvania Railroad Com pany and Samuel G. De Coursey, Receiver Thereof, et al., i No. 2.

1904, Oct. Term—Docketing cause and filing record, $5.00; appearance, .25; filing precipe and receipt, 50; filing papers, 50; filing motion, .25; filing briefs, $5.00; submission, .20; argument order, .20 ..... 11 6
Argument, .20; judgment, $1.00; filing same, .25; recording, .40; mandate, $5.00; attorney's docket fee, $20.00; costs and copy, .40 ..... 27 2

38 9

Fee Book 3, page 253.
Test:
WM. H. MERRICK,
Clerk Circuit Court of Appeals, 3d Circuit.

543 United States Circuit Court of Appeals, Third Circuit, Octo ber Term, 1904.

Costs of Lehigh Valley Railroad Company in No. 3.

19—, — Term—Docketing cause and filing record, $5.00; appearance, .25; filing papers, 1.00; filing briefs, $5.00; submission, .20; order, .20 ..... 11 6
Judgment, $1.00; filing same, .25; recording, .40; mandate, $5.00; *docket fee, $20.00;* costs and copy, .40 ..... 7 0

18 7

Fee Book 3, page 254.
Test:
WM. H. MERRICK,
Clerk Circuit Court of Appeals, 3d Circuit.

544 WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE GOURNEY, the Receiver Thereof; THE WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON & MAINE RAILROAD COMPANY, Plaintiffs in Error,

vs.

REUBEN L. RICE and JOS. C. ROBINSON, as Members of the Firm of Rice & Robinson, and Successors of the Firm of Rice, Robinson & With-rop, Defendants in Error.

United States Circuit Court of Appeals for the Third Circuit.

Of September Term, 1903. No. —.

It is stipulated and agreed this 17th day of November, 1905, by and between the above parties, by their attorneys, as follows, viz:

Whereas on April 11, 1901, the Defendants in Error above named commenced an action by Petition under the Act of Congress relating to Interstate Commerce and its Amendments, against the Plaintiffs in Error above named in the Circuit Court of the United States for the Western District of Pennsylvania, said action being No. 29 of May term, 1901 in the said Court; And thereafter such proceedings were had therein that an issue was duly framed and tried before a judge and jury of said Court on the 26th day of May, 1902, upon which date a verdict was rendered for the Plaintiffs in the sum of Seven hundred four and 08/100 Dollars ($704.08). And thereafter on February 12, 1903, the Defendants' motion for a new trial having been overruled, judgment was entered upon the said verdict; And on the second day of March, 1903, a Petition for an Appeal, Assignments of Error, a Bond Sur Writ of Error and Bills of Exceptions on behalf of all the Defendants were filed; And on the Fourth day of March, 1903, a Writ of Error was allowed and filed, and a citation was awarded, issued and served;

And whereas the record required for use in the Circuit Court of Appeals in this case was printed together with the records of
545 two other cases heard and determined at the same time in the said lower court and relating to the same subject matter, viz., Penn Refining Company, Limited, *vs.* Western New York & Pennsylvania Railroad Company, *et al.*, No. 23 of May term, 1901, and Penn Refining Company, Limited, *vs.* Western New York & Pennsylvania Railroad Company, *et al.*, No. 25 of May term, 1901, and the said records were duly filed in the Circuit Court of Appeals for the Third Circuit, and the three cases were subsequently argued before the said Court;

And whereas the Writ of Error in this present case was inadvertently omitted to be printed with the remainder of the record and with the records of the other two cases above referred to, and owing to such omission this case has never been entered upon the docket of the Circuit Court of Appeals for the Third Circuit, and no Order of Affirmance or Reversal nor any other order touching the disposition of the same has been made by the said Court;

And whereas three Orders of Reversal were entered by said Court, two of them in the cases hereinabove mentioned, in which the Penn Refining Company, Limited, was Plaintiff below, and one of them upon the docket of the said Circuit Court of Appeals upon a duplication of one of the said cases which had been through error repeated on the said docket;

It is therefore stipulated and agreed that this case may be now placed upon the docket of the Circuit Court of Appeals for the Third Circuit as of September term, 1903, with the same effect as if a Writ of Error had been filed in the said Court with the other parts of the said record, and that an Order of Reversal be now entered thereon as of May, 1st, 1905, and that a Mandate issue thereon directed to the Court below, saving to all parties any and all right of appeal from the Circuit Court of Appeals to the Supreme Court of the United States which would have accrued to such parties had the said
546 Order of Reversal and Mandate been entered and issued by the Court itself without this stipulation.

LEE & MACKEY,
SAM'L MEHARD,
Attorneys for Def'ts in Error.
PATTERSON, STERRETT & ACHESON,
For Plaintiffs in Error.

(Indorsed:) September Term 1903. No. —. Circuit Court of Appeals Third Circuit. Western New York & Pennsylvania Railroad Company, and Samuel G. De Coursey, the Receiver thereof; the Western New York & Pennsylvania Railway Company, the Fitchburg Railroad Company and the Boston & Maine Railroad Company, Plaintiffs in Error, *vs.* Reuben L. Rice and Jos. C. Robinson, as members of the firm of Rice & Robinson, and successors of the firm of Rice, Robinson & With-rop, Defendants in Error. Stipulation. Filed, December 6th, 1905.

547 REUBEN L. RICE and JOSEPH C. ROBINSON, as Members of the Firm of Rice and Robinson, and Successors to the Firm of Rice, Robinson and Witherop,

vs.

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, the Receiver Thereof; THE WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON AND MAINE RAILROAD COMPANY.

No. 29. May Term, 1901.

And now, to wit, March 2, 1903, come the defendants, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey the Receiver thereof, the Western New York and Pennsylvania Railway Company, the Fitchburg Railroad Company and the Boston and Maine Railroad Co., defendants above named, and file

the following assignments of error to the record in the above entitled case:

First. The Court erred in admitting the following offer of counsel for plaintiff from the report of the finding of the Interstate Commerce Commission, being paragraph beginning at the bottom of page 90 in the printed report of said Commission and extending down to the middle of page 91, said paragraph being as follows:

"After full investigation and mature consideration, we hold, that where both modes of transportation are employed by the carrier, and the use of one, the tank car, is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments, in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels, on like quantities of oil between like points of shipment and destination, then to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue ad-
548 vantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing the discrimination by any of the defendant carriers."

To which counsel for defendant objected as follows:

"Which offer was objected to by counsel for defendant as not containing a finding of fact, but involving a conclusion of law reached by the Commission as to the effect of its exi-ting rates on barrel shippers.

"By the COURT: "Referring to the 19th offer by the plaintiff of findings of fact from the report of the Interstate Commerce Commission, with the exception of the four lines which refer to the case of Rice, Robinson and Witherop, we think the paragraph constitutes a finding of fact, and the objections are, therefore, overruled, and exceptions noted for the defendants."

Second. The court erred in admitting the following offer of evidence, under objection of defendant, which said offer, objection of these defendants, and ruling of the court thereon, are as follows:

"Counsel for plaintiff now offer in evidence the findings of fact of the Interstate Commerce Commission, as found in their report in order, on the subject of reparation, marked Exhibit "H," as referred to in the plaintiff's petition, and as admitted in the answer of the defendants."

"Counsel for Samuel G. De Coursey, Receiver of the Western New York and Pennsylvania Railroad Company, further especially objects to the said alleged findings of fact being offered in evidence, as to any rights of the said Receiver, for the reason that the said Receiver was not a party to the proceedings before the Interstate Commerce Commission in which the findings of fact were made and entered.

"By the COURT: The objection to the admission of this
549 order as an order are overruled. The order is received in evidence and its effect is restricted simply as showing the basis on which the statutory proceeding by petition is based, and is not to have any binding effect as an order upon the jury; to this extent, and

to this extent only, the order is admitted in evidence. As to the findings of fact contained or embraced in the order, we are of opinion that the objections thereto should be overruled. We are of opinion that these findings of fact are made *prima facie* evidence under the Act of Congress, and further, that the question of the Western New York & Pennsylvania Railway Company not being bound by this record has been passed upon by this court in a former stage of this proceeding in an opinion filed on the — day of —— and reported in 82 Fed. Rep., 192."

"To which ruling of the court defendant ask for an exception and the same is noted."

Third. The court erred as follows, in its general charge to the jury:

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs, and justly, fairly, and impartially determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and *Port* Amboy, so established by these two companies (if you find that to be the fact), did subject the oil shipper in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. If you so find, you will also determine to what extent was the rate undue and unreasonable, and whatever amount you so find under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made, and on which it has paid the undue and unreasonable amount."

550 Fourth. The court erred in charging the jury as follows, in the general charge:

"In regard to the defendants, Samuel G. De Coursey, Receiver, and the Western New York and Pennsylvania Railway Company, it appears that the original company, (that is, the Western New York and Pennsylvania Railroad Company) against which this petition was originally filed on December 4, 1888, went into the hands of Samuel G. De Coursey, as Receiver, on April 1, 1893. Prior thereto, to wit, on the 16th day of November, 1892, an order was made by the Interstate Commerce Commission against the Western New York and Pennsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation.

"It is alleged (and upon this point, we express no opinion, for you will notice that we leave some facts to be found by you) that thereafter, to wit, on the twenty-second day of October, 1895, an order was made against the Receiver, Samuel G. De Coursey, among others, directing him, as Receiver of the road, and the Western New York and Pennsylvania Railroad Company to make reparation to the plaintiff of a specific amount, which has been read in evidence before you.

"It is alleged that during this proceeding to thus ascertain the amount of reparation to be made, the Receiver was represented by counsel and took part in those proceedings and resisted the entry of the making of such an order. It is also alleged that he was notified of this order of reparation and declined to comply with the same.

"If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against the Western New York and Pennsylvania Railroad Company, the original company, in other respects, and that the said Railroad company united, as explained above, in making a through joint rate
551 with the New York, Lake Erie and Western Railroad Company and the Delaware and Hudson Canal Company, and in so doing subjected refined oil in barrels to an undue and unreasonable prejudice or disadvantage, and that when the company ceased to operate its road and it passed into the hands of Receiver, such Receiver continued to maintain such rate and declined to obey the desisting and reparation orders, and continued the litigation, then we are of opinion that by such acts and the adoption of the rate, the Receiver, as Receiver, has so acted that he should not be exempt from the verdict that this jury might find, if in other respects the plaintiff is entitled to recover a verdict. And as, under the decree of this court, under which this road was sold to the Western New York and Pennsylvania Railway Company, the said Company was made liable for liabilities incurred by the Receiver, we instruct you that if the plaintiff is entitled, under the foregoing instructions, to a verdict against the Receiver, the jury should be warranted in also rendering a verdict against the Western New York and Pennsylvania Railway Company."

Fifth. The court erred in its following answer to the point presented by the defendants, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, the Receiver thereof.

"That under all the evidence the verdict of the jury should be for the defendants, the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver thereof."

(Answer.) "Inasmuch as each and every one of the points presented by the several defendants asks us, in each case, to give binding instructions to the jury to find a verdict for the several defendants, we decline to give such peremptory instructions, and the points are, therefore, severally refused, and exceptions noted for the
552 several defendants presenting the same."

Sixth. The court erred in its answer to the following point presented by the defendant, the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the Receiver thereof,—

"That under all the evidence the verdict of the jury should be for the defendant, the Western New York and Pennsylvania Railway Company."

(Answer.) "Inasmuch as each and every one of the points presented by the several defendants asks us, in each case, to give binding instructions to the jury to find a verdict for the several defendants, we decline to give such peremptory instructions, and the points are, therefore, severally refused, and exceptions noted for the several defendants presenting the same."

Seventh. The court erred in its answer to the point presented by the defendant, Samuel G. De Coursey, Receiver, which said point and answer are as follows:

"That under all the evidence the verdict of the jury should be for the defendant, Samuel G. De Coursey, Receiver of the Western New York and Pennsylvania Railroad Company."

(Answer.) "Inasmuch as each and every one of the points presented by the several defendants asks us, in each case, to give binding instructions to the jury to find a verdict for the several defendants, we decline to give such peremptory instructions, and the points are, therefore, severally refused, and exceptions noted for the several defendants presenting the same."

PATTERSON, STERRETT & ACHESON,
Attorneys for Plaintiffs in Error.

553 (Indorsed:) No. 29 May Term, 1901. Reuben L. Rice and Joseph C. Robinson, as members of the firm of Rice and Robinson, and successors to the firm of Rice, Robinson and Witherop, *vs.* Western New York and Pennsylvania R. R. Co., and Samuel G. De Coursey, the Receiver thereof, the Western New York and Pennsylvania Ry. Co., the Fitchburg R. R. Co., and the Boston and Maine R. R. Co. Assignments of Error of Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the Western New York and Pennsylvania Ry. Co., the Fitchburg R. R. Co., and the Boston and Maine Railroad Co. Filed March 2d. 1903. H. D. Gamble, Clerk.

554 United States Circuit Court of Appeals, Third Circuit.

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, the Receiver Thereof; THE WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON AND MAINE RAILROAD COMPANY, Plaintiffs in Error,

v.

REUBEN L. RICE and JOSEPH C. ROBINSON, as Members of the Firm of Rice and Robinson, and Successors of the Firm of Rice, Robinson and Witherop, Defendants in Error.

Error to U. S. Circuit Court, Western District of Pennsylvania, in No. 29, May Term, 1901.

Before Dallas and Gray, Circuit Judges, and Bradford, District Judge.

Per Curiam: Pursuant to the stipulation of the parties through their attorneys of record, and for reasons expressed by this court in Western New York & P. R. R. Co. *et al. v.* Penn Refining Co., Limited, of Oil City, Pa., 137 Fed. 343, the judgment of the court below in this case must be reversed with costs, and it is so ordered.

G. G.
G. M. D.
E. G. B.

Filed January 3, 1906.

555 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1904.

No. 64.

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, the Receiver Thereof; THE WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON AND MAINE RAILROAD COMPANY, Plaintiff- in Error,

v.

REUBEN L. RICE and JOSEPH C. ROBINSON, as Members of the Firm of Rice and Robinson, and Successors of the Firm of Rice, Robinson and Witherop, Defendants in Error.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause, be, and the same is hereby reversed with costs.

GEO. M. DALLAS,
Circuit Judge.

Philadelphia, January 5, 1906.

556 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1904.

No. 64.

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, the Receiver Thereof; THE WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON AND MAINE RAILROAD COMPANY, Plaintiff- in Error,

v.

REUBEN L. RICE and JOSEPH C. ROBINSON, as Members of the Firm of Rice and Robinson, and Successors of the Firm of Rice, Robinson and Witherop, Defendants in Error.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

And now, to wit, this 2nd day of February A. D., 1906, it is ordered that Mandate issue to the said Circuit Court of the United States, for the Western District of Pennsylvania in accordance with the Opinion and judgment of this Court in said cause.

GEO. M. DALLAS,
Circuit Judge.

557 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Western District of Pennsylvania, Greeting:

[SEAL.]

Whereas, lately in the Circuit Court of the United States for the Western District of Pennsylvania, before you or some of you, in a cause between the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey Receiver thereof, the Western New York and Pennsylvania Railway Company, the Fitchburg Railroad Company and the Boston and Maine Railroad Company, Plaintiffs in Error, against, Reuben L. Rice and Joseph C. Robinson, as members of the firm of Rice and Robinson, and successors of the firm of Rice, Robinson and Witherop, Defendants in Error, wherein the judgment of the said Circuit Court entered in said cause is in the following words, viz.:—

"And now to wit February 12, judgment is hereby entered upon the verdict in pursuance with the foregoing opinion."

558 as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of a Writ of Error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

559 And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and four, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause, be, and the same is hereby reversed with costs, and that the said Defendants, the Western New York and Pennsylv Railroad Company and Samuel G. De Coursey the Receiver thereof; the Western New York and Pennsylvania Railway Company, the Fitchburg Railroad Company and the Boston and Maine Railroad Company, recover against the said Plaintiffs, Reuben L. Rice and Joseph C. Robinson, as members of the firm of Rice and Robinson and successors of the firm of Rice, Robinson and Witherop, thirteen dollars and fifty cents for their costs herein expended and have execution therefor.

Philadelphia, January 5, 1906.

560 You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 2nd day of February, in the year of our Lord one thousand nine hundred and six.

Costs of Plaintiffs in Error.

Clerk	$13.50
Printing Record	
Attorney	
	$13.50

WM. H. MERRICK,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] U. S. Circuit Court of Appeals, Third Circuit. 64. October Term, 1904. Western N. Y. & Penn'a R. R. Co. *et al.*, Plaintiffs in Error, *vs.* Reuben L. Rice and Jos. C. Robinson, trading etc. Mandate.

561 United States Circuit Court of Appeals, Third Circuit, October Term, 1904.

Cost of Western New York and Pennsylvania Railroad Company et al. in No. 64.

19—, — Term—Docketing cause and filing record, $5.00; appearance, .25; filing precipe and receipt, .25; filing papers, .75; *filing motion, .25; filing briefs, $5.00; submission, .20; order, .20; continuance, .25*	6 25
19—, — Term—Transfer $1.00; appearance, .25; filing precipe and receipt, —; filing papers, —; filing motion, .25; filing briefs, $5.00; submission, .20; order, .20; continuance, .25	
19—, — Term—Transfer, $1.00; appearance, 25; filing precipe and receipt, —; filing papers, —; filing motion, .25; filing briefs, $5.00; submission, .20; order, .20; continuance, .25	
19—, — Term—Transfer, $1.00; appearance, .25; filing precipe and receipt, —; filing papers, —; filing briefs, $5.00; argument, .20; submission, .20; judgment, $1.00; filing same, .25; recording, .40; mandate, $5.00; preparing record for printer, etc., $—; cost of printing record, $—; attorney's docket fee, $20.00; cost and copy, .40....	7 25
	13 50

Fee Book 4, page 199.
Test:

WM. H. MERRICK,
Clerk Circuit Court of Appeals, 3d Circuit.

562 In the United States Circuit Court of Appeals, Third Circuit.

At No.—, October Term, 1904.

WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, Receiver Thereof; THE WESTERN NEW YORK & PENNSYLVANIA RAILWAY COMPANY and THE LEHIGH VALLEY RAILROAD COMPANY,

v.

PENN REFINING COMPANY, LIMITED.

Whereas at the trial of the above entitled case, before Judge Buffington and a jury in the Circuit Court of the United States for the Western District of Pennsylvania, the plaintiff below, the Penn Refining Company, Limited, did offer in evidence a certain original statement which it had filed with the Interstate Commerce Commission, and which statement was an official document of the Commission and had been loaned by the Commission to the plaintiff for use at the said trial before Judge Bu*g*fington and a jury, and was to be returned to the Commission and replaced upon its files after the said trial was concluded; and

Whereas by an oversight no copy of the said statement was filed in the records of the case as tried before Judge Buffington and the said jury, and upon an appeal from the judgment and ver-
562½ dict in the said Circuit Court taken by the defendants below to the above entitled case, it became necessary to use the said statement in the argument and such statement was so used; and

Whereas counsel for the appellants did agree in writing that the said original statement might be used at the argument with the same force and effect as if it had been returned to and was a part of the record; and

Whereas the Penn Refining Company, Limited, is about to appeal from the judgment entered against it in the above entitled case to the Supreme Court of the United States; and

Whereas the said the Penn Refining Company, Limited, considers such original statement material and necessary for the correct hearing of its appeal before the judges of the Supreme Court of the United States and desires to have the same, or a copy thereof, attached to and filed with the record of the case in the United States Circuit Court of Appeals for the Third Circuit so that the same may become a part of and go up with the certified copy of the record to the Supreme Court of the United States on the appeal there to be argued and heard; and

Whereas the attorneys for the Penn Refining Company, Limited, are about to present a petition to the said United States Cir-
563 cuit Court of Appeals for permission to file the said original statement or a copy thereof with the record so that the same may become a part thereof; and

Whereas counsel for the defendant railroads and receiver, in order to save the trouble and expense of making the said petition, are

willing that a copy of the said original statement, duly certified under the oath of the copyist, may be filed with the record of the above entitled case in the United States Circuit Court of Appeals there to become a part of and to be incorporated in the said record:

Now it is agreed by the attorneys for the Penn Refining Company, Limited, of the one part, and the counsel for the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, receiver thereof, and the Western New York and Pennsylvania Railway Company and the Lehigh Valley Railroad Company of the second part, that a true copy of the said original statement may be filed with and among the record and papers in the above entitled suit, there to be incorporated in and become a part of the said record as fully and with the same force and effect as though the original statement had been itself filed with and incorporated in the same; and that the paper marked "Exhibit A" and attached hereto and made a part hereof as fully as though incorporated at length herein, is a true and correct copy of such original statement; and further that this agreement may be filed in and among the records of the above entitled case in the United States Circuit Court of Appeals for the Third Circuit with the same force and effect as if the same
564 had been originally attached to and become a part of the record therein, and that the same, with all its exhibits, shall be copied by the Clerk of the said Court into the certified copy of the record which he will be required to send to the Supreme Court of the United States when the papers perfecting the said appeal have been filed with him. All of which is to be done with the same force and effect as if an order of the United States Circuit Court of Appeals, Third Circuit, had been first had and made to that end by the Judges thereof.

Witness our hands this twenty-third day of October in the year of our Lord, one thousand nine hundred and five.

SAM'L S. MEHARD,
LEE & MACKEY,
Attorneys for the Penn Refining Company, Limited.
PATTERSON, STERRETT & ACHESON,
FRANCIS F. GOWEN,
Attorneys for Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver Thereof; the Western New York & Pennsylvania Railway Company and the Lehigh Valley Railroad Company.

565 STATE OF PENNSYLVANIA, *County of Allegheny, ss:*

Be it remembered that on this Sixteenth day of October, in the year of our Lord, one thousand nine hundred and five, before me, a Notary Public in and for the said county and state, personally appeared Bess Hare, who, being by me first duly sworn according to law, says she has made a true and correct copy of the original statement filed with the Interstate Commerce Commission by the Penn

Refining Company, Limited, and referred to in the foregoing agreement, and that Exhibit A attached to such agreement is such true and correct copy.

BESS HARE.

Sworn to and subscribed before me the day and year aforesaid. Witness my hand and notarial seal.

CORNELIUS D. SCULLY.

My commission expires Jan'y 19, 1907.

CHARTS

TOO

LARGE

FOR

FILMING

588 Supreme Court of the United States.

At No. —, of October Term, 1906.

PENN REFINING COMPANY, LIMITED, Plaintiff in Error,
v.
WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, Receiver Thereof; THE WESTERN NEW YORK & PENNSYLVANIA RAILWAY COMPANY and THE LEHIGH VALLEY RAILROAD COMPANY, Defendants in Error.

In Error.

To the Honorable the Judges of the said Court:

The Penn Refining Company, Limited, the above named plaintiff in error, represents to this Honorable Court and states the facts to be:—

First. That heretofore, to wit, on May 1, 1905, *1905*, the Circuit Court of Appeals in and for the Third Circuit, in a case then pending before it at proceedings entered therein to Nos. 2 and 3 of October Term, 1904, wherein the above named defendants in error, Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof; the Western New York & Pennsylvania Railway Company and the Lehigh Valley Railroad Company, were plaintiffs, and the above named plaintiff in error, this petitioner, was defendant, did enter a judgment reversing absolutely, and without allowing a writ of venire *facias de novo*, a judgment of
589 the Circuit Court in and for the Western District of Pennsylvania in favor of this plaintiff in error for twelve thousand seven hundred and six dollars and ninety-two cents.

Second. That the opinion of the said Circuit Court of Appeals wherein and whereby they entered the said judgment of reversal was rendered May 1, 1905, and will be found reported in Volume No. 137 of the Federal Reporter at page 343.

Third. That the case in which the said opinion was rendered and the said judgment and reversal entered is not one in which the jurisdiction of the said Circuit Court was dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States of citizens of different states; or one arising under the patent laws or under the revenue laws or under the criminal laws, nor was it a case in admiralty; but on the contrary the said case was one arising exclusively under an Act of Congress entitled "An Act to Regulate Commerce" approved February 4, 1887, and commonly known and designated as the Interstate Commerce Act, and the several amendments and supplements thereto, and was in truth and fact a suit brought in the said Circuit Court to recover the amount of eight thousand five hundred and seventy-nine dollars and interest, being the amount awarded by the Interstate Commerce Commission to this plaintiff in error for overcharges on freight

shipments made by the said defendants in error in violation of the provisions of the said Interstate Commerce Act.

Fourth. That the said case was heard in the said Circuit
590 Court before a judge and a jury of twelve, and a verdict rendered in favor of this plaintiff in error in the sum of twelve thousand seven hundred and six dollars and ninety-two cents, upon which verdict a judgment was subsequently entered without diminution, so that the amount or matter in controversy involved in this writ of error, exclusive of interest and costs, exceeds the sum of one thousand dollars.

Wherefore the said plaintiff in error, Penn Refining Company, Limited, conceiving itself to be aggrieved by the judgment of the said Circuit Court of Appeals entered in the said case, does now and hereby appeal therefrom and remove the same by writ of error to the Supreme Court of the United States, and it prays that a writ of error may be allowed and that transcript of the record and proceedings and papers upon which the said judgment was entered, duly authorized and authenticated, may be sent to this, the Supreme Court of the United States of America.

S. S. MEHARD,
M. J. HEYWONG,
JOHN B. CHAPMAN,
LEE & MACKEY,
Attorneys for Plaintiff in Error.

And now, to wit, April 7th, 1906, it is ordered that the writ of error prayed for be allowed.

H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

591 STATE OF PENNSYLVANIA, *County of Venango, ss:*

Be it remembered that on this 19th day of February in the year of our Lord one thousand nine hundred and six, before me, a Notary Public in and for said county and state, personally appeared S. Justus, who being by me first duly sworn according to law says he is Secretary and one of the managers of the Penn Refining Company, Limited, the plaintiff in error in the above and foregoing petition, and that the statements made and set forth in the said petition are true.

S. JUSTUS.

Sworn to and subscribed before me the day and year aforesaid. In witness whereof I have hereunto set my hand and affixed my notarial seal.

[SEAL.] EDMOND C. BREENE,
Notary Public.

My commission expires January 19, 1907.

592 (Indorsed:) Penn Refining Company, Limited, *v.* Western New York and Pennsylvania Railroad Company and

Samuel G. De Coursey, Receiver thereof; the Western New York and Pennsylvania Railway Company and the Lehigh Valley Railroad Company. Petition for Writ of Error. Filed, April 17. 1906.

593 B.

Supreme Court of the United States.

At No. —, of October Term, 1906.

PENN REFINING COMPANY, LIMITED, Plaintiff in Error,

v.

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, Receiver Thereof; THE WESTERN NEW YORK & PENNSYLVANIA RAILWAY COMPANY and THE LEHIGH VALLEY RAILROAD COMPANY, Defendants in Error.

In Error.

Assignments of Error.

Now, comes the above named plaintiff in error, Penn Refining Company, Limited, by S. S. Mehard, M. J. Heywang, John B. Chapman and Lee & Mackey, its counsel, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:—

First. The Circuit Court of Appeals, Third Circuit, erred in holding the following findings of fact by the Interstate Commerce Commission to have been wrongfully received in evidence by the Circuit Court and in reversing the judgment of that court therefor, such findings of fact being as follows:—

Before the Interstate Commerce Commission.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PA., and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PA.,

v.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, THE DELAWARE AND HUDSON CANAL COMPANY, and THE BOSTON AND MAINE RAILROAD COMPANY.

594 SAME

vs.

THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, and THE LEHIGH VALLEY RAILROAD COMPANY.

SAME

vs.

THE PENNSYLVANIA RAILROAD COMPANY and THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

Complaints filed in First two cases, December 4th, 1888, and in third case January 30th, 1889. Answers filed December 26th,

1888, to February 23d, 1889. Heard at Titusville, Pa., May 15th, 1889. Briefs filed February 11th, 1890, to September 23d, 1891. Decided November 14th, 1892.

"These three cases were heard together, and may be disposed of at the same time."

"The Independent Refiners' Association of Titusville, Pa., and the Independent Refiners' Association of Oil City, Pa., the complainants in each case, are composed of separate and distinct companies engaged in the manufacture and sale of refined petroleum and products of petroleum at works owned and operated by them in the oil regions of Pennsylvania, at or near said cities of Titusville and Oil City."

"The leading questions raised by the pleadings in these cases relate (1) to the lawfulness of the charge for the barrel package under the circumstances and conditions disclosed by the evidence. * * *"

"The defendants transport oil in bulk in tank cars and in wooden barrels in box or rack cars. Prior to September 3d, 1888, the rates over the lines of the defendants on shipments of oil both in tanks and barrels had been the same for a like quantity of that commodity, exclusive of any charge for the weight of the barrel in barrel shipments, but about that time the rates on barrel shipments were increased about fourteen cents to New York points and more to Boston points, this additional charge being for the weight of the barrel, and as the rates on tank shipments, not including the weight of the tank or package, were not advanced, but allowed to remain as they were, the result was a discrimination in favor of the tank as against the barrel shipper. The question is whether that discrimination is, in the language of the statute, an 'unjust discrimination.'

595

"The defendants set up several matters in excuse or justification of their action in this matter. They claimed in the first place, that in originally making the additional charge for the barrel package, they did so in compliance with what they conceived to be the ruling of this Commission in reference thereto in the case of Rice *vs.* Louisville & N. R. R. Co., *1* Inter. Com. Rep., 722, 1 I. C. C. Rep., 503. This point is fully discussed in the case of Rice, Robinson & Witherop, and it is made clear that not only no warrant for the action of the carriers proceeded against in the present cases is found in any ruling of this Commission, but also that said action is in disregard of the 'principle plainly and emphatically laid down by the Commission' in said case of Rice and also in the subsequent case of Scofield *vs.* Lake Shore and L. S. R. R. Co., 2 Inter. Com. Rep., 67, 2 *L.* C. C. Rep., 90. If it be conceded that in the language used by the Commission in said cases there was some color for the original institution of the discrimination arising from the charge from the weight of the barrel, yet no authority for the continuance of that discrimination can be predicated of such language since the issuance by the Commission and communication to the carriers of the memorandum entitled '*Re* relative Tank and Barrel Rates on Oil, 2 Inters. Com. Rep., 245, 2 I. C. C. Rep., 365, in which it was declared

that the action of the carriers in this particular was unwarranted by the decisions in said cases.

"Having instituted the discrimination in order, as they allege, to bring their practice into conformity with what they understood to be the rulings of this Commission, the carriers now seek to justify and maintain this departure from their former custom of long standing on other grounds.

"It is claimed that in case of special facilities at loading and unloading points, the tank cars are handled more rapidly than cars carrying oil in barrels. This may be true, but the testimony is that the railroads should provide these facilities, and there are none at the seaboard of which the complainants can avail themselves. When special facilities for loading and unloading tank cars are not available, greater delay occurs than in loading and unloading barrel cars. It is further set up by the carriers in justification of the charge by the barrel package, that the barrel belongs to the shipper and is an article of merchandise, and when shipped from the oil regions to the seaboard sells for an advance over cost in the oil region equal to the freight paid on the barrel. They estimate the cost of the barrel in the oil region without the manufacturer's profit at from one dollar and eleven cents to one dollar and sixteen cents and the selling price in New York at from one dollar and thirty cents to one dollar and thirty-two cents and a half per barrel, which would be a profit somewhere greater than the amount of the freight charge of fourteen cents. This estimate, however, only includes the cost of the barrel as received from the barrel maker, and ignores the further cost incurred by the refiner in preparing the barrel as a receptacle of oil. After the barrel is received from the manufacturer, the refiner has to paint it on the outside, coat it with glue within,
596 put in a bunghole and provide a bung, plug wormholes, recooper the barrel and see that it is perfectly tight. The proof shows that the cost of the labor and material for this preparation of the barrel is from sixteen cents to seventeen cents per barrel, and that this added to the original cost as received from the manufacturer, makes the total cost per barrel to the refiner from one dollar and thirty cents to one dollar thirty-two and one half cents, the selling price in New York.

"The total cost of the barrel and its preparation to the refiner at Titusville and Oil City is shown by the following itemized statements, the first being made at Oil City, and the second at Titusville:

"1.

"New barrels, with heavy iron, for export	$1.16
"Labor in coopering, gluing, painting and loading on cars, per barrel	.033
"Glue, per barrel	.065
"Paint, rosin, naptha, &c., per barrel	.02
"Bungs, stencils, brushes, repairs to machinery and buildings, steam, &c.	.025
"Total per barrel	$1.325

"2.

"New barrels, heavy hoops, average price	$1.13
"Total labor, per barrel	.06
"Glue, per barrel	.06
"Paint, rosin, naptha, per barrel	.02
"Bungs, rivets, iron, plugs, per barrel	.005
"Stencils, brands, brushes, brooms, &c., per barrel	.003
"Tools, utensils, fillers, hose, and machinery	.02
"Total per barrel	$1.30

"If sold in New York or paid for as part of the consignment, the barrel does not bring more than its cost to the shipper, and when returned empty it is at the shipper's expense. Moreover, as is said in the Rice, Robinson & Witherop case, 'in the carriage of oil the barrel is not shipped as merchandise but as a package or means of transportation of the oil.' 3 Inters. Com. Rep., 162, 4 I. C. C. Rep., 152.

"It is also maintained that the transportation in tanks yields the carrier a larger revenue above the cost of service than that in barrels. In support of this contention, tables showing dead and paying weight hauled in ten cars carrying oil in bulk and in box cars carrying oil in barrels, respectively, were introduced in evidence on the part of the defendants, and it appears therefrom that the amount of paying freight hauled in the average tank car is greater than that in the average car loaded with barrels, and that in consequence the revenue to the carrier is somewhat greater in the
597 former case than in the latter, even when the barrel package is charged for, and is, of course, still greater, where no charge is made for the barrel package. It is claimed by one of the witnesses that at the present rate of sixteen and one-half cents per one hundred pounds to New York points, the carrier would receive on an average train load, the barrel package being charged for, thirty-five dollars and seventy-six cents more for the transportation of oil in tanks than in barrels, and excluding the charge for the barrel package, $237.30 more. Without affirming the strict accuracy of these tables and estimates, it may be conceded the evidence shows the amount of paying freight to be materially greater in tank shipments than in barrel shipments. In the case of Scofield *vs.* Lake Shore & L. S. R. R. Co., 2 Inters. Com. Rep. 67, 2 I. C. C. Rep. 20, it was found that the tank car taking the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with the full load.' 2 Inters. Com. Rep. 7, 2 I. C. C. Rep. 103.

"This plea that the transportation in tanks is the more profitable to the carrier in yielding a larger revenue above the expense of service was presented in the case of Rice, Robinson & Witherop and was in effect held to be no justification of the discrimination between tank and barrel shippers under the circumstances and conditions regulating the use of the two modes of transportation. These circumstances and conditions do not present a case of two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper may

take his choice and pay accordingly, but a case where the cheaper rated and, as is claimed by the defendants, the better, mode of transportation is available practically to only a particular class of shippers. The railroads do not to any particular extent use tank cars or furnish facilities for loading and unloading them, but they are used almost entirely by the shippers and limited in their use to such owners." (Pages 75, 76, 77, 78, 79, and part of 80.)

"The tank of the tank car performs the function of a package in tank shipments as the barrel does in barrel shipments." (Page 83.)

"The carrier, in renting and paying mileage for the tank car, furnishes the tank shipper a package and free transportation thereof; the barrel shipper furnishes his own package and is charged for its transportation. At 14 cents a barrel on the minimum car load of 60 barrels, the discrimination against the barrel shipper amounts to $6.30, equivalent to freight at tank rates on over 16 barrels of oil. The average distance from Oil City and Titusville to New York harbor points by the railway lines between those points is over 300 miles. The mileage paid per car for round trip at ¾ cents per mile amounts to over $7.50. The tank shipper, therefore, receives about $7.50 per round trip for the use of his car including a package for his oil, while the barrel shipper pays $8.40 per car for the transportation of his packages one way.

"The cost of the tank cars is from $600 to $634; it requires special facilities for loading and unloading, has to be cleaned out
598 after use to render it fit for carriage of different qualities of oils, and carries no return loads from the east. Barreled oil is transported in box and rack cars; the box cars generally used for that purpose are old and inferior, unfit for transportation of merchandise in general and new box cars are seldom used, as the leakage and odor of the oil are calculated to render them unsuitable for the carriage of freight liable to be damaged thereby. The box car costs about $450. It is estimated, and the evidence tends to show, that from five to ten per cent. of the cars used in carrying oil in barrels return loaded.

"A statement introduced in evidence, dated October 1st, 1889, shows that the total tank car equipment of the United States, so far as then known, was 7864 cars, owned and operated as follows:—

"Owned by railroads		1,342
"Owned by companies and individuals not connected with the Standard Oil Company (approximately)		1,844
"Leased by Standard Oil Company to outside parties		300
"Total operated by parties nor connected with Standard Oil Company (approximately)		3,486
"Owned by Standard Oil Company	4,497	
"Less leased to others	300	
"Total operated by Standard Oil Company		4,197
"Owned in part by Standard Oil Company		181
		4,378
"Total tank car equipment		7,864

"From this it will be seen that the Standard Oil Company owns and operates over half of the total tank car equipment of the United States. The complainants manufacture refined petroleum and its products at or near Oil City and Titusville, and sell the same in the domestic markets and at the Atlantic seaboard for export. They do this business in competition with the Standard Oil Company and others. The capacity of the refineries of complainants is about two million barrels per annum, and their actual shipments for the year 1898 were about a million and a half barrels of petroleum products. The shipments were entirely by rail and, for the most part, in barrels." (Pages 84 and 85.)

599 "In the statement above of the total tank car equipment of the United States, thirteen hundred and forty-two is the number given as owned by railroad companies. Of these, eleven hundred and thirty belong to the Pennsylvania Railroad Company, leaving two hundred and twelve as the number owned by all other railroads in this country. Practically, then, with the exception of the Pennsylvania Railroad Company, the defendants carry oil in tank cars for such shippers only as own the cars and supply them to the roads." (Pages 87 and 88.)

"After full investigation and mature consideration our conclusion in reference to the charge for the barrel package is in line with that in the case of Rice, Robinson & Witherop, and with the principles pertinent to the question laid down in that case and in the cases of Rice and Schofield, and we hold that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances had been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers." (Pages 90 and 91.)

"The defendants in the case against the Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company, the Delaware and Hudson Canal Company, the Fitchburg Railroad Company, and the Boston and Maine Railroad Company form a route over which petroleum products are transported in car loads from the Pennsylvania oil regions to Boston and New England points; the defendants in the case, the Western New York and Pennsylvania, the New York, Lake Erie and Western Railroad Company, and the Lehigh Valley Railroad Company, form a route over which such transportation is conducted from such oil regions to New York harbor points." (Page 92.)

"In many instances the same railroad forms a link in several routes. The Western New York and Pennsylvania Railroad is the initial carrier in each of the three routes formed by the roads com-

plained against, and is also the initial carrier in most of said other routes. All these routes form two classes: One composed of those carrying for the New England trade or Boston points, and the other of those carrying for New York harbor and vicinity, mainly for export. Each class, respectively, maintains the same rates. These rates, so far as shown by tariffs on file with this Commission up to date, have been as follows: (Page 94 of plaintiff's petition and exhibits. See page 14.)

600 "Beginning at January, 1885, the open rate of fifty-two cents was paid without any rebate, and from January, 1886, to September 3d, 1889, the rate by all lines to New York was generally fifty-two cents per barrel, but there is evidence tending to show that in 1884 there was a rate of sixty cents to Jersey City." (Page 95.)

"About 1881 two pipe lines for conveying crude oil from the Pennsylvania oil regions to the seaboard were completed, the Tide Water Pipe Line and that of the National Transit Company. The Tide Water Pipe Line was first constructed. Both these pipe lines are carriers of crude oil between the points named and originally were in competition with each other and with the rail lines. The low rates prevailing by rail from about 1881 to about January, 1885, are, it is claimed, attributable to this competition. Under this competition the rates reached a very low, if not unremunerative, figure, both by pipe and rail, and about December, 1883, the pipe line, with the view of getting better rates, adjusted their differences, and the competition between them ceased. The pipe line business appears, then, to have passed into the control of the National Transit Company. The Pennsylvania Railroad Company, about 1885, entered into the contract with the National Transit Company, which, as set forth in the complaint against the Pennsylvania Company, is a contract 'for the pooling or division of the traffic on oil between the Pennsylvania Company and the National Transit Company, one consideration of which contract was the maintenance of the same rates on oil by the railroad and by pipe line, and under and by virtue of which the said National Transit Company guarantees to the Pennsylvania Railroad Company twenty-six per cent. of the entire oil traffic from the Pennsylvania oil regions to tide water.' The Pennsylvania Railroad Company admits the contract substantially as stated by the complainants, but avers 'that the sole purpose of it was to secure and maintain a reasonable and compensatory rate to itself for the service to be rendered; that the rates now charged are only reasonable and just, and that it would be impossible to carry said traffic at a lower rate without entailing upon itself unreasonable loss.' The evidence tends to show that under this contract the rate of fifty-two cents per barrel for tank and barrel shipments was put in force both by the pipe lines and by the Pennsylvania Company, and was thereupon adopted by all the class of lines to New York harbor points. September 2d, 1888, notice was given of an advance of fourteen cents per barrel for the weight of the barrel on barrel shipments, to become effective September 13th, 1888, making the rate on such shipments sixty-six cents per barrel.

Tariffs issued by Western N. Y. & Penna. R. R. Joint with following lines:		To New York from Titusville and Oil City.		To New York Harbor points.					
				To Jersey City from Titusville and Oil City.		To Perth Amboy from Titusville and Oil City.		To Communipaw from Titusville and Oil City.	
		In bbls.	In T. cars.	In bbls.	In T. cars.	In bbls.	In T. cars.	In bbls.	In T. cars.
N. Y. Lake Erie & West'n R. R.									
November 10, 1887.	Per Bbl.			58	(From			52	(From
March 3, 1888.	" "			52	Titusville.)				Titusville.)
September 3, 1888.	Per 100 lbs.			16½	16½				
October 17, 1889.		18½	18½						
West Shore R. R.									
April 23, 1887.	Per Bbl.	58		58				52	
July —, 1887.	" "								52
September 3, 1888.	Per 100 lbs.	18½	18½						
February 10, 1892.	" " "	19½	19½						
D. L. & W. and Delaware & Hudson Canal Co.'s R. R.									
December 15, 1888.	" " "	18½	18½						
NOTE.—Rates withdrawn Oct. 24, 1891.									
Lehigh Valley R. R.									
September 3, 1888.	" " "	18½	18½	18½	18½	16½	16½		
NOTE.—Rates to New York withdrawn October 20, 1891.									
Issued by Pennsylvania Railroad. (Green Line.)									
April 8, 1887.	Per Bbl.							52	52
February 20, 1888.	" "			52	52	52	52	52	52
September 5, 1888.				66	52	66	52	66	52

PAGE BOUND VERTICALLY

602 "On the basis of the estimated or constructive weights placed by the carriers on oil by the gallon in tank shipments, and on the barrel and its contents in barrel shipments (which weights will be considered further on), both the fifty-two cents rate and sixty-six cents rate amounted (when they were adopted) to sixteen and one-half cents per hundred pounds of oil transported." (Pages 96 and 97.)

"It is further ordered, that the defendants cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants and others who may apply therefor, for the purpose of loading and shipping oil therein to such New York harbor and Boston points as the shipper may direct; and that said defendants notify the public accordingly by publication in their tariff of rates and charges, pursuant to the provisions of section 6 of the Act to regulate commerce, and also file copies of said tariffs with this Commission, as required by the provisions of said section. It is further ordered that the rate on shipments of oil, both in tanks and barrels over said roads, shall be the same and said rate from said oil region to New York points shall not exceed sixteen and one-half cents per hundred pounds, and to Boston and Boston points shall not exceed twenty-one and one-half cents per hundred pounds; and the defendants are required to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package on shipments of oil in barrels, when the use of the tank cars has not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use." (Pages 122 and 123.)

"Inasmuch as the amounts wrongfully received from the complainants respectively cannot be ascertained from the evidence already taken, the proceedings will be continued for such further action or inquiry in that behalf as may become necessary." (Page 122.)

"Upon the facts herein, we are forced to the conclusion that the only practical remedy for the unjust discrimination now existing, is to give defendants the alternative of abolishing the charge for the barrel, and in so doing we are only permitting them to return to a practice which they followed during a long period, which they only discontinued under a mistaken construction of our original Rice decision, and which they now seek to justify on wholly different grounds." (Page 125.)

Second. The said Circuit Court of Appeals erred in holding the following findings of fact by the Interstate Commerce Commission to have been wrongfully received in evidence by the Circuit Court and in reversing the judgment of that court therefor; such findings of fact being as follows:

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603 "After full investigation and mature consideration, our conclusion in reference to the charge for the barrel package is in line with that in the case of Rice, Robinson & Witherop and with the principles pertinent to the question laid down in that case and in the cases of Rice and Schofield, and we hold that where both modes of transportation are employed by the carrier and the use of one, the tank care, is not open to shippers impartially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments, in the absence of a corresponding charge on tank shipments, resuling in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers."

Third. The said Circuit Court of Appeals erred in holding the following findings of fact by the Interstate Commerce Commission to have been wrongfully received in evidence by the Circuit Court and in reversing the judgment of that court therefor; such findings of fact being as follows:

"It is further ordered that the defendants cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their roads or lines from the oil region of Western Pennsylvania to New York and New York Harbor points, or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants and others who may apply therefor, for the purpose of loading and shipping oil therein to such New York Harbor and Boston points as the shipper may direct; and that said defendants notify the public accordingly by publication in their tariff or rates and charges, pursuant to the provisions of section 6 of the Act to regulate commerce, and also file copies of said tariffs with this Commission, as required by the provisions of said section. It is further ordered that the rate on shipments of oil, both in tanks and in barrels, over said roads shall be the same, and said rate from said oil regions to New York points shall not exceed sixteen and one-half cents per hundred pounds, and to Boston and to Boston points shall not exceed twenty-three and one-half cents per hundred pounds; and the defendants are required to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package on shipments of oil in barrels, when the use of the tank cars has not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use."

604 Fourth. The said Circuit Court of Appeals erred in holding that the order made by the Interstate Commerce Commission and known and designated at the trial as "Exhibit E" was wrongfully received in evidence by the Circuit Court and in re-

versing the judgment of that court therefor; said Exhibit E being as follows:

At a general Session of the Interstate Commerce Commission held at its office, at Washington, D. C., on the 14th day of November, A. D. 1892.

Present: Hon. William R. Morrison, Chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements, Commissioners.

THE INDEPENDENT REFINERS' ASSOCIATION, OF TITUSVILLE, PENNSYLVANIA, and THE INDEPENDENT REFINERS' ASSOCIATION, OF OIL CITY, PENNSYLVANIA,

vs.

THE WESTERN NEW YORK AND PENNSYLVANA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, THE DELAWARE AND HUDSON CANAL COMPANY, THE FITCHBURG RAILROAD COMPANY, and THE BOSTON AND MAINE RAILROAD COMPANY.

SAME

vs.

THE WESTERN NEW YORK AND PENNSYLVANA RAILROAD COMPANY, THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, and THE LEHIGH VALLEY RAILROAD COMPANY.

SAME

vs.

THE PENNSYLVANIA RAILROAD COMPANY and THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

These cases being at issue upon complaints and answers on file, and having been fully heard and submitted by the parties, and investigation of the matters and things herein involved having been had, and the Commission having on the date hereof made and filed a report and opinion containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order, and the Commission having, as appears by said report and opinion, found and decided, among other things, that the wastage allowance of forty-two gallons per tank car heretofore deducted by defendants from shipments of petroleum oil in such cars before computing freight charges thereon, and the method of estimating weight of such oil shipped in tank cars and in
605 barrels by which the shipper in tanks was enabled to secure the transportation of a greater amount or weight of oil for the same aggregate sum as was charged for a like service in the transportation of oil in barrels, were and are unlawful; that the action of the defendants in charging for the weight of barrels on shipment of refined oil in barrels over the several through lines formed by their respective railroads from Titusville, Oil City and other points in the oil regions of Western Pennsylvania, to New

York and other points on New York harbor, or to Boston and points called and known as Boston points, works unjust discrimination against the shipper of such oil in barrels in favor of shippers of the same commodity in tank cars, while said defendants refuse or neglect to furnish tank cars to complainants and other shippers for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; that rates per hundred pounds on shipments of oil in tanks or in barrels should be the same, and from said points in the oil regions of western Pennsylvania to New York harbor and Boston points such rates should not exceed 16½ cents and 23½ cents respectively, and that defendants should make reparation to complainants and others in all cases where charges on shipments in barrels between those points have included a charge for the weight of the barrel, and tank cars have not been open impartially to shippers of refined petroleum oil over their lines:

It is ordered and adjudged, that the defendants, The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company, The Delaware and Hudson Canal Company, The Fitchburg Railroad Company, The Boston and Maine Railroad Company, The Lehigh Valley Railroad Company, and The Pennsylvania Railroad Company be, and they severally are hereby, required to base charges for the transportation of refined petroleum oil over their lines upon the actual weight of shipments, whether in tanks or barrels, except in cases where such actual weights cannot be ascertained without great inconvenience, when such a rule or method of estimating weights shall be adopted and employed by them as will practically operate to secure to any shipper of such oil in barrels the transportation of an amount or weight of freight equal to the amount or weight of freight which, for the same aggregate sum, they contemporaneously carry or offer to carry between the same points for any shipper of such oil in tanks, and that these cases be held open for such further and more specific directions in regard to such assumed or estimated weights as may hereafter appear necessary, and that said defendants and each of them do also abstain from allowing on shipments of petroleum in tank cars a deduction of 42 gallons per tank before freight charges are computed or any such allowance or deduction whatever, unless a corresponding and equivalent concession be made on shipments of such oil in barrels.

It is further ordered and adjudged, that said defendants be, and they severally are hereby, required to wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipment of oil in barrels over their re-
606 spective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points, or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct, and that on or before the 9th of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges pursuant to the provisions of section 6 of the Act to

regulate commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section; and defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels when the use of tank cars has not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use; and inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary.

It is further ordered and adjudged, that the rate on shipments of refined petroleum oil, both in tanks and in barrels, over said roads or lines shall be the same, and that said rate from said oil regions to New York points shall not exceed 16½ cents per hundred pounds, nor shall said rate from said oil regions to Boston and Boston points exceed 23½ cents per hundred pounds, and said defendants are hereby required to arrange their tariffs of rates and charges accordingly.

It is further ordered, that a notice embodying this order be forthwith sent to each of the defendant corporations, together with the report and opinion of the Commission herein, in conformity with the fifteenth section of the Act to regulate commerce."

Fifth. The said Circuit Court of Appeals erred in holding that those portions of the order of reparation made by the Interstate Commerce Commission and known and designated at the trial as "Exhibit H," which were offered by the plaintiff in error, were wrongfully received in evidence by the Circuit Court, and in reversing the judgment of that Court therefor; such portions so received being as follows:

"Upon a report and opinion filed and by order entered herein on November 14, 1892, the defendants in the above entitled case were required, among other things, as follows:

"To 'cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on ship-
607 ments of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; and that, on or before the 9th day of January, 1893, said defendants notify the public accordingly by publication in their tariff of rates and charges, pursuant to the provisions of section 6 of the Act to Regulate Commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section.

"And said defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within 60 days after notice of this decision and demand thereof by such parties, all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels, when the uses of tank cars has not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use; and inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary."

The above mentioned portion of said order has not been complied with by the defendants in these cases in any respect. Upon application of counsel for various claimants seeking reparation under the order, a hearing to ascertain "what amounts have been wrongfully received from complainants and others who may be entitled to such reparation" was held at Titusville, Pa., on May 15 and 16, 1894. Proof was then submitted by claimants as to their respective demands, but as copies of the claims presented had not been served upon the defendant carriers, a stipulation was entered into between counsel for claimants and counsel representing the several defendants in this respect, to the effect that the claimants should serve copies of their claims upon the initial carriers, and that thereupon such carriers and the connecting carriers in the several routes would examine and check the various items set forth in the claims and afterwards file the same, together with statements, with the Commission. This operated to delay the proceeding until the terms of the stipulation should be carried out or until the Commission should enter some further order limiting the time of the parties to conform to such agreement. Considerable delay resulted from the failure of the claimants to promptly serve copies of their claims, and the carriers also evinced no disposition to hurry this matter of reparation to a close. This continued until June 10, 1895, when the Commissioner issued an order directing the carriers to complete their examination of claims served under the agreement and file the same with statements thereon not later than June 25, 1895. This time was extended by subsequent order applied for by the Lehigh
608 Valley Railroad Company, until July 15, 1895. The claims which were served upon defendant initial carriers by claimants, the originals or duplicates thereof now being on file in these cases, are the claims to be considered in this report.

These matters have been regularly heard and the defendant carriers have had full notice and ample opportunity to examine and oppose the claims.

The defendants have not, as required by our order of November 14, 1892, notified the public by filing and posting oil tariffs, that they or either of them would supply shippers with tank cars for oil transportation to New York harbor or Boston points. Such cars are not and have not been open to the use of shippers generally or any of the defendant roads. On the contrary before and since

complaints were filed in these cases, it has been the practice the defendants to hire tank cars of owning shippers by paying leage thereon, while at the same time denying other and coming shippers the right to use such cars, and compelling them to p their oil in barrels and pay transportation charges on the ght of the barrel.

The parties legally entitled to reparation at the hands of the dedants under our order of November 14, 1892, are oil shippers m Titusville, Oil City or points in the vicinity thereof, who were mbers of the complaining associations at the time the complaints re filed, or subsequently, up to the date of the hearing of these aration matters at Titusville on May 15, 1894.

The time which will be considered as properly covered by claims reparation in these cases is from September 3, 1888, the date en the practice of charging for carrying barrels containing oil s commenced, to May 15, 1894, when hearing on the claims was d.

The shipments which may be included in the claims are those m Titusville, Oil City and vicinity to New York and New York rbor points and Boston and points taking Boston rates, and which ssed over routes in which some one of the defendants was the car- r receiving the freight for transportation, initiating and control- g the method or mode of carriage, and billing the freight through destination at the aggregate rates of compensation charged.

The amount to be refunded is the charge collected by defendants the transportation of barrels containing petroleum oil shipped d carried as aforesaid, and where this barrel charge has not been ctly figured and reported by the defendant initial carrier, such rge will, as found in our Report and Opinion of November 14, 92, be 14 cents per barrel to New York harbor points and twenty nts per barrel to Boston and Boston points, except where a lower charge per barrel is demanded in said claims.

9 Of the various carriers named as defendants in these cases in our order of November 14, 1892, only the Western New rk and Pennsylvania and the New York, Lake Erie and Western pear to have been initial carriers for oil shipments mentioned in e claims. These roads have been in the possession of receivers and erated under the direction of United States courts during a portion the time properly covered by the claims. The affairs of the estern New York and Pennsylvania Railroad Company passed to the hands of Samuel G. De Coursey, as Receiver, on or about pril 1, 1893, and said Receiver was operating this road on May , 1894, when the hearing of this matter took place. The New rk, Lake Erie and Western Railroad Company has been, since or about July 26, 1893, and still is, operated by receivers appointed and controlled by a Federal Court. The receivers now in ssession of the properties of this company are J. G. McCullough d E. B. Thomas.

Following are the names of claimants, members of the complaing associations, who served their claims upon defendant initial

carriers in accordance with the stipulation entered into by counsel for claimants and defendants on May 16, 1894:

Initial carrier,—Western New York and Pennsylvania.

Penn Refining Company, Limited, Oil City, Pa.

John Schwartz & Co., Titusville, Pa.

Rice and Robinson, Titusville, Pa.

Rice, Robinson & Foggan, Titusville, Pa.

Independent Refining Company, Limited, Oil City, Pa.

Genie Wood, doing business under the trade name of The Oil Creek Refining Works, Titusville, Pa.

American Oil Works, Limited, Titusville, Pa.

Western Refining Company, Limited, Titusville, Pa.

S. Y. Ramage, doing business under the trade name of The Mutual Oil Company, Reno, Pa.

National Oil Company, Limited, Titusville, Pa.

Continental Refining Company, Limited, Oil City, Pa.

International Oil Works, Limited, Titusville, Pa.

In accordance with the above stated rulings and principles, we make the following findings and orders upon claims filed and served covering shipments of petroleum oil in barrels to New York and New York harbor points and Boston and points taking Boston rates, and which, between the 3rd day of September, 1888, and the 15th day of May, 1894, were delivered by claiming shippers to the Western New York and Pennsylvania Railroad Company or its Receiver for transportation to said destination.

Claim of the Penn Refining Company, Limited, Oil City, Pa.

The claimant, the Penn Refining Company, Limited of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh
610 Valley Railroad Company, the sum of eight thousand, five hundred and seventy-nine dollars, ($8,579.00) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad from Oil City, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York & Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of eight thousand, five hundred and seventy-nine dollars ($8,579.00), together with interest thereon at the rate of six per cent. per annum from May 15, 1894.

Sixth. The said Circuit Court of Appeals erred in holding the following charge to the jury by the trial judge of the Circuit Court to have been erroneous and in reversing the judgment of that Court therefor; such share to the jury being as follows:

"The questions you are to ascertain are to be passed upon by you under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this Interstate Commerce Commission."

Seventh. The said Circuit Court of Appeals erred in holding the following charge to the jury by the trial judge of the Circuit Court to have been erroneous and in reversing the judgment of that court therefor; such charge to the jury being as follows:

"On the part of the Lehigh Valley Railroad Company it is shown that on February 11th, 1892, it leased its road to the Philadelphia and Reading Railroad Company, which latter continued to operate it under said lease until August 1st, 1893. It is claimed on behalf of said road that for such period no damages can be found against or recovered from it. In view of the fact that under the lease in question the Lehigh Valley Railroad Company was to be paid by the Reading Company a percentage on the gross earnings of the road during the lease, we are of the opinion that the Lehigh Valley Railroad Company was not exempt from liability during the lease, if it was chargeable in other respects, and the plaintiff is entitled to recover against it in other respects. In view, however, of the admission of counsel for plaintiff that they have shown no shipments during said period and claim no reparation for such, it will be apparent to you that the question as to the giving of this lease need not concern the jury, and so I instruct you."

Eighth. The said Circuit Court of Appeals erred in holding there was evidence before the Interstate Commerce Commission and also before the said Circuit Court of the Western District of Pennsylvania that part of the amount included in the order of reparation sued upon and in the verdict of the jury and judgment thereon represented alleged illegal exactions of freight charges received while the Philadelphia and Reading Railroad Company was operating a portion of the through route under a lease from the Lehigh Valley Railroad Company.

Ninth. The said Circuit Court of Appeals erred in not holding and finding the fact to be that no portion of the amount in the order of reparation sued upon was or is for illegal freight charges overcharged the plaintiff in error on shipments of oil over the Lehigh Valley Railroad while that road was under lease to the Philadelphia and Reading Railroad Company.

Tenth. The said Circuit Court of Appeals erred in holding the following charge to the jury by the trial judge of the

Circuit Court to have been erroneous and in reversing the judgment of the court therefor; such charge to the jury being as follows:

"In regard to the defendants, Samuel G. De Coursey, Receiver, and the Western New York and Pennsylvania Railway Company, it appears that the original company (that is, the Western New York and Pennsylvania Railroad Company), against which this petition was originally filed, on December 4, 1888, went into the hands of Samuel G. De Coursey, as Receiver, on April 1, 1903. Prior thereto, to wit, on the 14th day of November, 1892, an order was made by the Interstate Commerce Commission against the Western New York and Pennsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation. It is alleged, (and upon this point we express no opinion, for you will notice that we leave some facts to be found by you), that thereafter, to wit, on the 22nd day of October, 1895, an order was made against the Receiver, Samuel G. De Coursey, among others, directing him, as Receiver of the Road, and the Western New York and Pennsylvania Railroad Company, to make reparation to the plaintiff of a specific amount which has been read in evidence before you. It is alleged, that during this proceeding to thus ascertain the amount of reparation to be made, the Receiver was represented by counsel and took part in those proceedings and resisted the entry of the making of such an order. It is also alleged that he was notified of this order of reparation and declined to comply with the same. If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against the Western New York and Pennsylvania Railroad Company, the original company, in other respects, and that the said railroad company united, as explained above, in making a through joint rate with the New York, Lake Erie and Western Railroad Company and the Delaware and Hudson Canal Company, and in so doing subjected refined oil in barrels to an undue and unreasonable prejudice or disadvantage, and that when the company ceased to operate its road and it passed into the hands of a Receiver, such Receiver continued to maintain such rate and declined to obey the desisting and reparation orders, and continued the litigation, then we are of the opinion that by such acts and the adoption of the rate, the Receiver, as Receiver, had so acted that he should not be exempt from the verdict that this jury might find, if in other respects the plaintiff is entitled to recover a verdict. And as, under the decree of this court, under which this road was sold to the Western New York and Pennsylvania Railway Company, the said company was made liable for liabilities incurred by the Receiver, we instruct you that if the plaintiff is entitled, under the foregoing instructions, to a verdict against the Receiver, the jury should be warranted in also rendering a verdict against the Western New York and Pennsylvania Railway Company."

613 Eleventh. The said Circuit Court of Appeals erred in holding that Samuel G. De Coursey, the Receiver of the Western New York and Pennsylvania Railroad Company was not and is not liable for the amount of the unlawful freight charges overcharged

the plaintiff in error on shipments of oil made by it over the Western New York and Pennsylvania Railroad.

Twelfth. The said Circuit Court of Appeals erred in holding that the Western New York and Pennsylvania Railway Company was not and is not liable for the amount of the unlawful freight charges overcharged the plaintiff in error on shipments of oil made by it over the Western New York and Pennsylvania Railroad Company.

Thirteenth. The said Circuit Court of Appeals erred in holding that the appointment of Samuel G. De Coursey as Receiver of the Western New York and Pennsylvania Railroad Company and his subsequent sale of the road of that company under an order of the court appointing him receiver, effectually prevented any recovery by the plaintiff in error from the said Samuel G. De Coursey, as Receiver, or from the Western New York and Pennsylvania Railway Company of any illegal freight charges overcharged the plaintiff in error on shipments of oil made by it over the Western New York and Pennsylvania Railroad.

Fourteenth. The said Circuit Court of Appeals erred in reversing the judgment of the Circuit Court.

Fifteenth. The said Circuit Court of Appeals, even if it
614 were justified in reversing the said judgment on some of the several assignments of error filed by the defendants in error, erred in not allowing and awarding a writ of *venire facias de novo*.

S. S. MEHERD,
M. J. HEYWONG,
JNO. B. CHAPMAN,
LEE & MACKEY,
EUGENE MACKEY,
Attorneys for Plaintiff in Error.

615 (Indorsed:) Penn Refining Company, Limited, Plaintiff in Error, *v.* Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof, the Western New York & Pennsylvania Railway Company and the Lehigh Valley Railroad Company, Defendants in Error. Supreme Court of the United States. In Error at No. — of October Term, 1906. Assignments of Error. Filed, April 17, 1906.

616 Supreme Court of the United States.

At No. —, of October Term, 1906.

PENN REFINING COMPANY, LIMITED, Plaintiff in Error,
vs.
WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY and SAMUEL G. DE COURSEY, Receiver Thereof; THE WESTERN NEW YORK & PENNSYLVANIA RAILWAY COMPANY and THE LEHIGH VALLEY RAILROAD COMPANY, Defendants in Error.

In Error.

Know all men by these presents that we, Penn Refining Company, Limited, of Oil City, Pennsylvania, as principal, and Theodore B.

Westgate of Titusville, Pennsylvania, and Peter Theobald of Titusville, Pennsylvania, as sureties, are held and firmly bound unto the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof; the Western New York & Pennsylvania Railway Company and the Lehigh Valley Railroad Company in the full and just sum of two thousand dollars, to be paid to the said Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof; the Western New York & Pennsylvania Railway Company and the Lehigh Valley Railroad Company, their certain attorneys, successors or assigns; to which payment well and truly to be made we do bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 18th day of February in the year of our Lord one thousand nine hundred and six.

617 Whereas, lately, at a United States Circuit Court of Appeals, Third Circuit, in a suit pending in said court between Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, receiver thereof; the Western New York & Pennsylvania Railway Company and the Lehigh Valley Railroad Company, plaintiffs therein and defendants in error herein, and the Penn Refining Company, Limited, defendant therein and plaintiff in error herein, a judgment was rendered against the said plaintiff in error, and the said Penn Refining Company, Limited, having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment in the aforesaid suit and the citation having been issued, directed to the said Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, receiver thereof; the Western New York & Pennsylvania Railway Company and the Lehigh Valley Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof;

Now the condition of the above obligation is such, that if the said Penn Refining Company, Limited, shall prosecute its said writ of error to effect, and answer all damages and costs, if it fail to

618 make its plea good, then the above obligation to be void; else to remain in full force and virtue.

PENN REFINING COMPANY, LIMITED,
[SEAL.] By H. SUHR CHAIRMAN, *Manager.*
S. JUSTUS, *Manager.*
PETER THEOBALD. [SEAL.]
THEODORE B. WESTGATE. [SEAL.]

Signed, sealed and delivered in the presence of
JOSEPH B. OLMSTED.
JULIUS BYLES.

619 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Peter Theobald and Theodore B. Westgate being each duly sworn according to law doth depose and say that they are the sur-ties in

he foregoing bond, and each for himself says that he is worth Fifty Thousand (50,000.00) dollars over and above all just debts and iabilities and exemptions.

PETER THEOBALD.
THEODORE B. WESTGATE.

Sworn to and subscribed before me this 18th day of February in he year of our Lord one thousand nine hundred and six.

[SEAL.]

GEORGE ALHOSE,
United States Commissioner.

The foregoing bond and sureties thereto approved.

—— BROWN,
Associate Justice of the Supreme Court of the United States.

620 (Indorsed:) Penn Refining Company, Limited, *v.* Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof; the Western New York and Pennsylvania Railway Company and the Lehigh Valley Railroad Company. Bond on Writ of Error. Filed April 17, 1906.

621 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof, Western New York & Pennsylvania Railway Company, and Lehigh Valley Railroad Company, plaintiffs in error, and Penn Refining Company, Limited, defendant in error, a manifest error hath happened, to the great damage of the said defendant in error, as by its complaint appears. We being willing that error, of any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 7th day of April, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Brought into office April 17, 1906. Wm. H. Merrick, Clerk.

622 UNITED STATES OF AMERICA, *ss:*

To Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof, Western New York & Pennsylvania Railway Company, and Lehigh Valley Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Third Circuit, wherein Penn Refining Company, Limited, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry B. Brown, Associate Justice of the Supreme Court of the United States, this Seventh day of April, in the year of our Lord one thousand nine hundred and six.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

623 April 16, 1906, the within citation served on us this day.
PATTERSON, STERRETT & ACHESON,
Attorneys for Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, Receiver thereof; Western New York & Pennsylvania Railway Company and Lehigh Valley Railroad Company.
FRANCIS I. GOWEN,
For Lehigh Valley R. R. Co.

"A"

624 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing pages from one to six hundred and twenty-three, to contain a full, true, complete and faithful copy of the original transcript of record

in the case of Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver thereof, the Western New York and Pennsylvania Railway Company and the Lehigh Valley Railroad Company, Plaintiffs in Error, *vs.* The Penn Refining Company, Limited, Defendant in Error, and in the case of the Western New York and Pennsylvania Railroad Company, and Samuel G. De Coursey, Receiver thereof; the Western New York and Pennsylvania Railway Company, the Fitchburg Railroad Company and the Boston and Maine Railroad Company, Plaintiffs in Error, *vs.* Reuben L. Rice and Joseph C. Robinson, as members of the firm of Rice and Robinson and successors of the firm of Rice, Robinson and Witherop, Defendants in Error, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia this second day of May, in the year of our Lord one thousand nine hundred and six and of the Independence of the United States the one hundred and thirtieth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 20,243. U. S. circuit court of appeals, 3d circuit. Term No. 285. Penn Refining Company, Limited, plaintiff in error, *vs.* Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, receiver thereof; Western New York & Pennsylvania Railway Company and Lehigh Valley Railroad Company. Filed May 4th, 1906. File No. 20,243.

Office Supreme Court, U. S.
FILED.
OCT 14 1907
JAMES H. McKENNEY
CLERK

No. 27.

IN THE

Supreme Court of the United States.

~~No. 301 OCTOBER TERM, 1906.~~

PENN REFINING COMPANY, Limited, Plaintiff in Error,

vs.

WESTERN NEW YORK and PENNSYLVANIA RAILROAD COMPANY, and SAMUEL G. DeCOURSEY, Receiver thereof; WESTERN NEW YORK and PENNSYLVANIA RAILROAD COMPANY and LEHIGH VALLEY RAILROAD COMPANY, Defendants in Error.

In Error to the United States Circuit Court of Appeals for Third District.

Brief for Plaintiff in Error.

M. J. HEYWARD,
JAMES W. LEE,
EUGENE MACKEY,
SAMUEL S. MEHARD,
Attorneys for Plaintiff in Error.

Smith Bros. Co. Inc., Franklin Print. 412 Grant Street, Pittsburg.

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IN THE

Supreme Court of the United States.

No. 285 OCTOBER TERM, 1906.

PENN REFINING COMPANY, Limited, Plaintiff in Error,

vs.

WESTERN NEW YORK and PENNSYLVANIA RAILROAD COMPANY, and SAMUEL G. DeCOURSEY, Receiver thereof; WESTERN NEW YORK and PENNSYLVANIA RAILROAD COMPANY and LEHIGH VALLEY RAILROAD COMPANY, Defendants in Error.

In Error to the United States Circuit Court of Appeals for Third District.

Questions Involved—History of the Case.

The Independent Refiners Association of Titusville, Pennsylvania, and the Independent Refiners Association of Oil City, Pennsylvania, were composed of sixteen independent oil refining companies located in the vicinity of Titusville and Oil City, in the said state of Pennsylvania. Penn Refining Company, Limited, the plaintiff in error, was one of those companies. The term "Independent" had reference to the fact that the constitutent companies were not embraced in the Standard Oil Company.

On the fourth day of December, 1888, the said associations filed their petition with the Interstate Commerce Commission, complaining of violations of the Interestate Commerce Law by the Western New York and Pennsylvania Railroad Company; New York, Lake Erie and Western Railway Company and Lehigh Valley Railroad Company. Among the violations so complained of was that the oil refining companies composing the said associations were subjected to unjust discrimination and to undue and unreasonable prejudice and disadvantage by the said railroad companies in respect to the freight rates charged for hauling oil in barrels from the refineries of the said oil refining companies to New York Harbor points over the through line of railroad formed by the said railroad companies under traffic contracts made between themselves.

The wrongs complained of more specifically stated were briefly these: That for a period of years prior to the year 1888 refined oil had been carried in barrels, and also in bulk in cylindrical tanks, firmly and permanently fastened on ordinary freight cars, and during all this period freight had been charged, whether in barrels or tank cars, solely on the weight of the oil. In the year 1888, without any reason being given therefor, the railroads began to charge for the weight of the barrel when shipped in barrels, adding the weight of the barrel to the weight of the oil, and charging the same rate of freight per hundred pounds on both; but when shipped in bulk in cylindrical tanks made no charge for the weight of the iron tank package. The Independent refiners were not provided with these tank cars and were unable to provide them for their shipments, and the railroads did not furnish the tank cars for bulk shipment to the independent refiners. This change made a discrimination against the independent refiners in favor of their competitors to New York points of fourteen cents a barrel, and to Boston and New England points of twenty cents a barrel.

The Interstate Commerce Commission heard the petitioners and respondents in respect to the matters complained of in the said petition, and on the fourteenth day of November, 1892, filed their report, with their findings of fact, their opinion and order, wherein the said Commission found that the said complaint was sustained and ordered the said respondent companies to desist from such unjust discrimination and from exacting the wrongful freight rates, and to refund to the companies complainants, respectively, the amounts wrongfully received, and continued the proceedings for the purpose of enabling the defendant to make reparation, and in the event of their failure or refusal so to do, to ascertain, in the orderly procedure required by the act of Congress, the amount of damages or pecuniary reparation to which each of said complainants was entitled.

That report is "Exhibit D."

Record, p. 28.

Such reparation not having been made, the Commission thereafter inquired into the amount to which each of said companies was entitled, and filed their report, with findings of fact, opinion and order, on the twenty-second day of October, 1895.

That report is "Exhibit H."

Record, p. 69.

The amount so found in favor of Penn Refining Company, Limited, of Oil City, Pa., was eight thousand five hundred and seventy-nine dollars, with interest from May 15, 1894, which amount was, by the said finding and order, assessed against the Western New York and Pennsylvania Railroad Company and Samuel G. DeCoursey, Receiver thereof, and the Lehigh Valley Railroad Company.

Each of the said orders was duly served on all parties in interest, but neither of them was in any measure obeyed by the respondents.

In 1896 the Interstate Commerce Commission presented its petition to the Circuit Court of the United States for

the Western District of Pennsylvania, seeking to enforce the said orders against the said respondents, and others in like case; but the said court ruled that so much of said orders as related to reparation could not be enforced in the name of the Interstate Commerce Commission, but that the respective Refining Companies would be required to proceed therefor in their own names.

Thereupon the petition of Penn Refining Company, Limited, was duly presented on the law side of the said Circuit Court, praying for the enforcement of the said order of reparation against the said Western New York and Pennsylvania Railroad Company and Samuel G. DeCoursey, Receiver thereof; Western New York and Pennsylvania Railway Company and Lehigh Valley Railroad Company, the said Western New York and Pennsylvania Railroad Company having been reorganized under the name of Western New York and Pennsylvania Railway Company.

Answer was made to the said petition, and the issue thus joined between the parties was tried by the said court.

On the trial of that case the court—Hon. Joseph Buffington presiding—admitted the findings of fact made by the Interstate Commerce Commission as *prima facie* evidence of the facts therein stated, and carefully excluded the finding or ruling of law:

The court also admitted the said orders made by the Interstate Commerce Commission for the purpose of showing that the steps required by the Interstate Commerce Act had been taken on the part of the plaintiff in said issue.

The court instructed the jury, in effect, that the said orders were not binding upon the said jury, and submitted to the jury upon all the evidence in the case to determine the elements of fact which would enter into the question of the lawfulness of the said orders, and particularly the said order of reparation.

The trial court likewise instructed the jury, in effect, that the Lehigh Valley Railroad Company would not be

relieved from liability to the plaintiff by reason of a lease given in evidence between the said Railroad Company and the Philadelphia & Reading Railroad Company, even if part of the damages accrued within the period of said lease, inasmuch as the wrongful rate existed when said lease was made, and the Lehigh Valley continued to receive a percentage thereof by the terms of said lease; and the court further instructed the jury that the plaintiff stated that no part of the damages assessed had accrued during the period of said lease, and that, therefore, the lease did not enter into their deliberations.

The court further instructed the jury that if they found the facts necessary to establish the liability of the Western New York & Pennsylvania Railroad Company, and if the wrongful through joint rate existed when Simon G. DeCoursey was made Receiver of said road, and was continued by him, and if he had due notice of said orders and litigation and continued said wrongful rate as such Receiver, declining "to obey the desisting and reparation orders," he would not be exempt from liability for the order of reparation or from the verdict of the jury thereunder; and that inasmuch as the reorganized road, the Western New York & Pennsylvania Railway Company was, by the order of sale or of reorganization, made liable for liabilities incurred by the Receiver, the said reorganized company would be liable likewise.

The jury rendered a verdict in favor of the plaintiff for the amount of damages assessed in favor of the plaintiff by the Interstate Commerce Commission, as aforesaid, with interest thereon, as provided in said order, from the fifteenth day of May, 1894.

After judgment on said verdict an appeal was taken by the defendants to the Circuit Court of Appeals for the Third District.

The Circuit Court of Appeals held that the trial court had been guilty of error in admitting in evidence the findings

of the Interstate Commerce Commission shown by the first and second assignments of error—the ground of such decision being that said findings were not of fact, but of law.

The Circuit Court of Appeals held that the trial court had committed error in admitting the orders made by the Commission; first, in admitting the said orders in evidence, and second, in charging the jury with respect thereto, as shown by that part of the charge embraced in the sixth assignment of error; the conclusion of the said Circuit Court of Appeals being that the said orders were unlawful.

The Circuit Court of Appeals held that the instruction given to the jury by the trial court on the subject of the lease from the Lehigh Valley Railroad Company to the Philadelphia & Reading Railroad Company was error.

And that the instruction given by the trial court as to the liability of Samuel G. DeCoursey, Receiver of the Western New York & Pennsylvania Railroad Company, and the liability of the reorganized company, the Western New York & Pennsylvania Railway Company, was likewise erroneous.

The Court of Appeals thereupon reversed the judgment of the court below absolutely.

Assignments of Error.

Now comes the above named plaintiff in error, Penn Refining Company, Limited, by S. S. Mehard, M. J. Heywang, John B. Chapman and Lee & Mackey, its counsel, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

FIRST. The Circuit Court of Appeals, Third Circuit, erred in holding the following findings of fact by the Interstate Commerce Commission to have been wrongfully received in evidence by the Circuit Court and in reversing the judgment of that court therefor, such findings of fact being as follows:

BEFORE THE INTERSTATE COMMERCE COMMISSION.

The Independent Refiners' Association of Titusville, Pa., and the Independent Refiners' Association of Oil City, Pa.,

vs.

The Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company, the Delaware and Hudson Canal Company, and the Boston and Maine Railroad Company.

Same

vs.

The Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company, and the Lehigh Valley Railroad Company.

Same

vs.

The Pennsylvania Railroad Company and the Western New York and Pennsylvania Railroad Company.

Complaints filed in first two cases, December 4th, 1888, and in third case January 30th, 1889. Answers filed December 26th, 1888, to February 23rd, 1889. Heard at Titusville, Pa., May 15th, 1889. Briefs filed February 11th, 1890, to September 23rd, 1891. Decided November 14th, 1892.

"These three cases were heard together, and may be disposed of at the same time."

"The Independent Refiners' Association of Titusville, Pa., and the Independent Refiners' Association of Oil City, Pa., the complainants in each case, are composed of separate and distinct companies engaged in the manufacture and sale of refined petroleum and products of petroleum at works owned and operated by them in the oil regions of Pennsylvania, at or near said cities of Titusville and Oil City."

"The leading questions raised by the pleadings in these cases relate (1) to the lawfulness of the charge for for the barrel package under the circumstances and conditions disclosed by the evidence. * * *"

"The defendants transport oil in bulk in tank cars and in wooden barrels in box or rack cars. Prior to September 3d, 1888, the rates over the lines of the defendants on shipments of oil both in tanks and barrels had been the same for a like quantity of that commodity, exclusive of any charge for the weight of the barrel in barrel shipments, but about that time the rates on barrel shipments were increased about fourteen cents to New York points and more to Boston points, this additional charge being for the weight of the bar-

rel, and as the rates on tank shipments, not including the weight of the tank or package, were not advanced, but allowed to remain as they were, the result was a discrimination in favor of the tank as against the barrel shipper. The question is whether that discrimination is, in the language of the statute, an 'unjust discrimination.'

"The defendants set up several matters in excuse or justification of their action in this matter. They claimed, in the first place, that in originally making the additional charge for the barrel package, they did so in compliance with what they conceived to be the ruling of this Commission in reference thereto in the case of *Rice vs. Louisville & N. R. R. Co.*, 1 Inter. Com. Rep., 722, 1 I. C. C. Rep., 503. This point is fully discussed in the case of Rice, Robinson & Witherop, and it is made clear that not only no warrant for the action of the carriers proceeded against in the present cases is found in any ruling of this Commission, but also that said action is in disregard of the 'principle plainly and emphatically laid down by the Commission' in said case of Rice and also in the subsequent case of *Scofield vs. Lake Shore and L. S. R. R. Co.*, 2 Inter. Com. Rep., 67, 2 L, C. C. Rep., 90. If it be conceded that in the language used by the Commission in said cases there was some color for the original institution of the discrimination arising from the charge from the weight of the barrel, yet no authority for the continuance of that discrimination can be predicated of such language since the issuance by the Commission and communication to the carriers of the memorandum entitled, '*Re* relative Tank and Barrel Rates on Oil, 2 Inters. Com. Rep., 245, 2 I. C. C. Rep., 365, in which it was declared that the action of the carriers in this particular was unwarranted by the decisions in said cases.

"Having instituted the discrimination in order, as they allege, to bring their practice into conformity with what they understood to be the rulings of this Commission, the carriers now seek to justify and maintain this departure from their former custom of long standing on other grounds.

"It is claimed that in case of special facilities at loading and unloading points, the tank cars are handled more rapidly than cars carrying oil in barrels. This may be true, but the testimony is that the railroads should provide these facilities, and there are none at the seaboard of which the complainants can avail themselves. When special facilities for loading and unloading tank cars are not available greater delay occurs than in loading and unloading barrel cars. It is further set up by the carriers in justification of the charge by the barrel package that the barrel belongs to the shipper and is an article of merchandise, and when shipped from the oil regions to the seaboard sells for an advance over cost in the oil region equal to the freight paid on the barrel. They estimate the cost of the barrel in the oil region without the manufacturer's profit at from one dollar and eleven cents to one dollar and sixteen cents and the selling price in New York at from one dollar and thirty cents to one dollar and thirty-two cents and a half per barrel, which would be a profit somewhere greater than the amount of the freight charge of fourteen cents. This estimate, however, only includes the cost of the barrel as received from the barrel maker, and ignores the further cost incurred by the refiner in preparing the barrel as a receptacle of oil. After the barrel is received from the manufacturer the refiner has to paint it on the outside, coat it with glue within, put in a bunghole and provide a bung, plug wormholes, recooper the barrel and see that

it is perfectly tight. The proof shows that the cost of the labor and material for this preparation of the barrel is from sixteen cents to seventeen cents per barrel, and that this added to the original cost as received from the manufacturer, makes the total cost per barrel to the refiner from one dollar and thirty cents to one dollar thirty-two and one-half cents, the selling price in New York.

"The total cost of the barrel and its preparation to the refiner at Titusville and Oil City is shown by the following itemized statements, the first being made at Oil City, and the second at Titusville:

"1.

"New barrels, with heavy iron, for export,	$1.16
"Labor in coopering, gluing, painting and loading on cars, per barrel,	.033
"Glue, per barrel,	.065
"Paint, rosin, naphtha, etc., per barrel,	.02
"Bungs, stencils, brushes, repairs to machinery and buildings, steam, etc.,	.025
"Total per barrel,	$1.325

"2.

"New barrels, heavy hoops, average price,	$1.13
"Total labor, per barrel,	.06
"Glue, per barrel,	.06
"Paint, rosin, naphtha, per barrel,	.02
"Bungs, rivets, iron, plugs, per barrel,	.005
"Stencils, brands, brushes, brooms, etc, per barrel,	.003
"Tools, utensils, fillers, hose and machinery,	.02
"Total per barrel,	$1.30

"If sold in New York or paid for as part of the consignment the barrel does not bring more than its cost to the shipper, and when returned empty it is at the

shipper's expense. Moreover, as is said in the *Rice, Robinson & Witherop* case, 'in the carriage of oil the barrel is not shipped as merchandise, but as a package or means of transportation of the oil.' 3 Inters. Com. Rep., 162, 4 I. C. C. Rep., 152.

"It is also maintained that the transportation in tanks yields the carrier a larger revenue above the cost of service than that in barrels. In support of this contention, tables showing dead and paying weight hauled in ten cars carrying oil in bulk and in box cars carrying oil in barrels, respectively, were introduced in evidence on the part of the defendants, and it appears therefrom that the amount of paying freight hauled in the average tank car is greater than that in the average car loaded with barrels, and that in consequence the revenue to the carrier is somewhat greater in the former case than in the latter, even when the barrel package is charged for, and is, of course, still greater, where no charge is made for the barrel package. It is claimed by one of the witnesses that at the present rate of sixteen and one-half cents per one hundred pounds to New York points, the carrier would receive on an average train load, the barrel package being charged for, thirty-five dollars and seventy-six cents more for the transportation of oil in tanks than in barrels, and excluding the charge for the barrel package, $237.30 more. Without affirming the strict accuracy of these tables and estimates, it may be conceded the evidence shows the amount of paying freight to be materially greater in tank shipments than in barrel shipments. In the case of *Scofield vs. Lake Shore & L. S. R. R. Co.* 2 Inters. Com. Rep. 67, 2 I. C. C. Rep. 20, it was found that the tank car taking the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with the full load.' 2 Inters. Com. Rep. 7, 2 I. C. C. Rep. 103.

"This plea that the transportation in tanks is the more profitable to the carrier in yielding a larger revenue above the expense of service was presented in the case of *Rice, Robinson & Witherop,* and was in effect held to be no justification of the discrimination between tank and barrel shippers under the circumstances and conditions regulating the use of the two modes of transportation. These circumstances and conditions do not present a case of two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper may take his choice and pay accordingly, but a case where the cheaper rated and, as is claimed by the defendants, the better, mode of transportation is available practically to only a particular class of shippers. The railroads do not to any particular extent use tank cars or furnish facilities for loading and unloading them, but they are used almost entirely by the shippers and limited in their use to such owners." (Pages 75, 76, 77, 78, 79, and part of 80.)

"The tank of the tank car performs the function of a package in tank shipments as the barrel does in barrel shipments." (Page 83.)

"The carried, in renting and paying mileage for the tank car, furnishes the tank shipper a package and free transportation thereof; the barrel shipper furnishes his own package and is charged for its transportation. At 14 cents a barrel on the minimum car load of 60 barrels, the discrimination against the barrel shipper amounts to $6.40, equivalent to freight at tank rates on over 16 barrels of oil. The average distance from Oil City and Titusville to New York harbor points by the railway lines between these points is over 300 miles. The mileage paid per car for round trip at 3/4 cents per mile amounts to over $7.50. The tank shipper,

therefore, receives about $7.50 per round trip for the use of his car including a package for his oil, while the barrel shipper pays $8.40 per car for the transportation of his packages one way.

"The cost of the tank cars is from $600 to $634; it requires special facilities for loading and unloading, has to be cleaned out after use to render it fit for carriage of different qualities of oils, and carries no return loads from the east. Barreled oil is transported in box and rack cars; the box cars generally used for that purpose are old and inferior, unfit for transportation of merchandise in general and new box cars are seldom used, as the leakage and odor of the oil are calculated to render them unsuitable for the carriage of freight liable to be damaged thereby. The box car costs about $450. It is estimated, and the evidence tends to show, that from five to ten per cent. of the cars used in carrying oil in barrels return loaded.

"A statement introduced in evidence, dated October 1st, 1889, shows that the total tank car equipment of the United States, so far as then known, was 7,864 cars, owned and operated as follows:

"Owned by railroads	1,342
"Owned by companies and individuals not connected with the Standard Oil Company (approximately)	1,844
"Leased by Standard Oil Company to outside parties	300
"Total operated by parties not connected with Standard Oil Company (approximately)	3,486
"Owned by Standard Oil Company	4,497
"Less leased to others	300

"Total operated by Standard Oil Company....	4,197
"Owned in part by Standard Oil Company....	181
	4,378
"Total tank car equipment	7,864

"From this it will be seen that the Standard Oil Company owns and operates over half of the total tank car equipment of the United States. The complainants manufacture refined petroleum and its products at or near Oil City and Titusville, and sell the same in the domestic markets and at the Atlantic seaboard for export. They do this business in competition with the Standard Oil Company and others. The capacity of the refineries of complainants is about two million barrels per annum, and their actual shipments for the year 1898 were about a million and a half barrels of petroleum products. The shipments were entirely by rail, and, for the most part, in barrels." (Pages 84 and 85.)

"In the statement above of the total tank car equipment of the United States, thirteen hundred and forty-two is the number given as owned by railroad companies. Of these, eleven hundred and thirty belong to the Pennsylvania Railroad Company, leaving two hundred and twelve as the number owned by all other railroads in this country. Practically, then, with the exception of the Pennsylvania Railroad Company, the defendants carry oil in tank cars for such shippers only as own the cars and supply them to the roads." (Pages 87 and 88.)

"After full investigation and mature consideration our conclusion in reference to the charge for the barrel package is in line with that in the case of Rice, Robinson & Witherop, and with the principles pertinent to

the question laid down in that case and in the cases of Rice and Schofield, and we hold that where both modes of transportation are employed by the carrier and the use of one, the tank car is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances had been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers." (Pages 90 and 91.)

"The defendants in the case against the Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company, the Delaware and Hudson Canal Company, the Fitchburg Railroad Company, and the Boston and Maine Railroad Company form a route over which petroleum products are transported in car loads from the Pennsylvania oil regions to Boston and New England points; the defendants in the case, the Western New York and Pennsylvania, the New York, Lake Erie and Western Railroad Company, and the Lehigh Valley Railroad Company, form a route over which such transportation is conducted from such oil regions to New York harbor points." (Page 92.)

"In many instances the same railroad forms a link in several routes. The Western New York and Pennsylvania Railroad is the initial carrier in each of the three routes formed by the roads complained against, and is also the initial carrier in most of said other

routes. All these routes form two classes: One composed of those carrying for the New England trade or Boston points, and the other of those carrying for New York harbor and vicinity, mainly for export. Each class, respectively, maintains the same rates. These rates, so far as shown by tariffs on file with this Commission up to date, have been as follows: (Page 94 of plaintiff's petition and exhibits. See page 14.)

"Beginning at January, 1885, the open rate of fifty-two cents was paid without any rebate, and from January, 1886, to September 3d, 1889, the rate by all lines to New York was generally fifty-two cents per barrel, but there is evidence tending to show that in 1884 there was a rate of sixty cents to Jersey City." (Page 95).

"About 1881 two pipe lines for conveying crude oil from the Pennsylvania oil regions to the seaboard were completed, the Tide Water Pipe Line and that of the National Transit Company. The Tide Water Pipe Line was first constructed. Both these pipe lines are carriers of crude oil between the points named and originally were in competition with each other and with the rail lines. The low rates prevailing by rail from about 1881 to about January, 1885, are, it is claimed, attributable to this competition. Under this competition the rates reached a very low, if not unremunerative, figure, both by pipe and rail, and about December, 1883, the pipe line, with the view of getting better rates, adjusted their differences and the competition between them ceased. The pipe line business appears, then, to have passed into the control of the National Transit Company. The Pennsylvania Railroad Company, about 1885, entered into the contract with the National Transit Company, which, as set forth in the complaint against the Pennsylvania Company, is a contract 'for the pooling or division of the traffic on oil between the

Pennsylvania Company and the National Transit Company, one consideration of which contract was the maintenance of the same rates on oil by the railroad and by pipe line, and under and by virtue of which the said National Transit Company guarantees to the Pennsylvania Railroad Company twenty-six per cent. of the entire oil traffic from the Pennsylvania oil regions to tide water.' The Pennsylvania Railroad Company admits the contract substantially as stated by the complainants, but avers 'that the sole purpose of it was to secure and maintain a reasonable and compensatory rate to itself for the service to be rendered; that the rates now charged are only reasonable and just, and that it would be impossible to carry said traffic at a lower rate without entailing upon itself unreasonable loss.' The evidence tends to show that under this contract the rate of fifty-two cents per barrel for tank and barrel shipments was put in force both by the pipe lines and by the Pennsylvania Company, and was thereupon adopted by all the class of lines to New York harbor points. September 2d, 1888, notice was given of an advance of fourteen cents per barrel for the weight of the barrel on barrel shipments, to become effective September 13th, 1888, making the rate on such shipment sixty-six cents per barrel.

Tariffs Issued by WESTERN N. Y. & PENNA R. R. Joint with following lines.		To New York from Titusville and Oil City.		TO NEW YORK HARBOR POINTS.					
				To Jersey City from Titusville and Oil City.		To Perth Amboy from Titusville and Oil City.		To Communipaw from Titusville and Oil City.	
		In Bbls.	In T Cars	In Bbls.	In T Cars	In Bbls.	In T Cars	In Bbls.	In T Cars
N. Y., Lake Erie & Western R. R									
November 10, 1887	Per bbl.			58	(From			52	(From
March 3, 1888	"			52	Titusv'le)				Titusv'le)
September 3, 1888	Per 100 lbs.			16½	16½				
October 17, 1889		18½	18½						
West Shore R. R.									
April 23, 1887	Per bbl.	58		58				52	52
July 1887	"								
September 3, 1888	Per 100 lbs.	18½	18½						
February 10, 1892	"	19½	19½						
D., L. & W. and Delaware & Hudson Canal Co.'s R. R.									
December 15, 1888	"	18½	18½						
Note:—Rates withdrawn Oct. 24, 1891.									
Lehigh Nalley R. R.									
Septemper 3, 1888	"	18½	18½	18½	18½	16½	16½		
Note:—Rates to N. Y., withdrawn Oct. 20, 1891									
Issued by Penna. R. R. (Green Line)									
April 7, 1888	Per bbl.							52	52
February 20, 1888	"			52	52	52	52	52	52
September 3, 1888				66	52	66	52	66	52

"On the basis of the estimated or constructive weights placed by the carriers on oil by the gallon in tank shipments, and on the barrel and its contents in barrel, shipments (which weights will be considered further on), both the fifty-two contracts and six-six cents rate amounted (when they were adopted) to sixteen and one-half cents per hundred pounds of oil transported." (Pages 96 and 97).

"It is further ordered, that the defendants cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants and others who may apply therefor, for the purpose of loading and shipping oil therein to such New York harbor and Boston points as the shipper may direct; and that said defendants notify the public accordingly by publication in their tariff of rates and charges, pursuant to the provisions of section 6 of the Act to regulate commerce, and also file copies of said tariffs with this Comimssion, as required by the provisions of said section. It is further ordered that the rate on shipments of oil, both in tanks and barrels over said roads, shall be the same and said rates from said oil region to New York points shall not exceed sixteen and one-half cents per hundred pounds, and to Boston and Boston points shall not exceed twenty-one and one-half cents per hundred pounds; and the defendants are required to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package on shipments of oil in barrels, when the use

of the tank cars has not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use." (Pages 122 and 123.)

"Inasmuch as the amounts wrongfully received from the complainants respectively cannot be ascertained from the evidence already taken, the proceedings will be continued for such further action or inquiry in that behalf as may become necessary." (Page 122.)

"Upon the facts herein, we are forced to the conclusion that the only practical remedy for the unjust discrimination now existing, is to give defendants the alternative of abolishing the charge for the barrel, and in so doing we are only permitting them to return to a practice which they followed during a long period, which they only discontinued under a mistaken construction of our original Rice decision, and which they now seek to justify on wholly different grounds." (Page 125.)

SECOND. The said Circuit Court of Appeals erred in holding the following findings of fact by the Interstate Commerce Commission to have been wrongfully received in evidence by the Circuit Court and in reversing the judgment of that court therefor; such findings of fact being as follows:

"After full investigation and mature consideration, our conclusion in reference to the charge for the barrel package is in line with that in the case of Rice, Robinson & Winthrop and with the principles pertinent to the question laid down in that case and in the cases of Rice and Schofield, and we hold that where both modes of transportation are employed by the carrier and the use of one, the tank car is not open to shippers impartially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments, in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the ship-

per in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers."

THIRD. The said circuit Court of Appeals erred in holding the following finding of fact by the Interstate Commerce Commission to have been wrongfully received in evidence by the Circuit Court and in reversing the judgment of that court therefor; such findings of fact being as follows:

"It is further ordered that the defendants cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their roads or lines from the oil regions of Western Pennsylvania to New York and New York Harbor points, or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants and others who may apply therefor, for the purpose of loading and shipping oil therein to such New York Harbor and Boston points as the shipper may direct; and that said defendants notify the public accordingly by publication in their tariff or rates and charges, pursuant to the provisions of section 6 of the Act to regulate commerce and also file copies of said tariffs with this Commission, as required by the provisions of said section. It is further ordered that the rate on shipments of oil, both in tanks and in barrels, over said roads shall be the same, and said rate from said oil regions to New York points shall not exceed sixteen and one-half cents per hundred pounds, and to Boston and to Boston points shall not exceed twenty-

three and one-half cents per hundred pounds; and the defendants are required to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package on shipments of oil in barrels, when the use of the tank cars has not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use."

FOURTH. The said Circuit Court of Appeals erred in holding that the order made by the Interstate Commerce Commission and known and designated at the trial as "Exhibit E" was wrongfully received in evidence by the Circuit Court and in reversing the judgment of that court therefor; said Exhibit E being as follows:

"At a general Session of the Interstate Commerce Commission held at its office, at Washington, D. C., on the 14th day of November, A. D., 1892.

Present: Hon. William R. Morrison, Chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements, Commissioners.

The Independent Refiners Association, of Titusville, Pennsylvania, and the Independent Refiners Association, of Oil City, Pennsylvania,

VS.

The Western New York and Pennsylvania Railroad Company; The New York, Lake Erie and Western Railroad Company; The Delaware and Hudson Canal Company; The Fitchburg Railroad Company, and The Boston and Maine Railroad Company.

Same

vs.

The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company, and The Lehigh Valley Railroad Company.

Same

vs.

The Pennsylvania Railroad Company and The Western New York and Pennsylvania Railroad Company.

"These cases being at issue upon complainants and answers on file, and having been fully heard and submitted by the parties, and investigation of the matters and things herein involved having been had, and the Commission having on the date hereof made and filed a report and opinion containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order, and the Commission having, as appears by said report and opinion, found and decided, among other things, that the wastage allowed of forty-two gallons per tank car heretofore deducted by defendants from shipments of petroleum oil in such cars before computing freight charges thereon, and the method of estimating weight of such oil shipped in tank cars and in barrels by which the shipper in tanks was enabled to secure the transportation of a great amount or weight of oil for the same aggregate sum as was charged for a like service in the transportation of oil in barrels, were and are unlawful; that the action of the defendants in charging for the weight of barrels on shipments of refined oil in barrels over the several through lines formed by their respective railroads from Titusville, Oil City and other points in the oil region of Western Pennsylvania, to

New York and other points on New York harbor, or to Boston and points called and known as Boston points, works unjust discrimination against the shipper of such oil in barrels in favor of shippers of the same commodity in tank cars, while said defendants refuse or neglect to furnish tank cars to complainants and other shippers for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; that rates per hundred pounds on shipments of oil in tanks or in barrels should be the same, and from said points in the oil regions of Western Pennsylvania to New York harbor and Boston points such rates should not exceed 16½ cents and 23½ cents respectively, and that defendants should make reparation to complainants and others in all cases where charges on shipments in barrels between those points have included a charge for the weight of the barrel, and tank cars have not been open impartially to shippers of refined patroleum oil over their lines:

"It is Ordered and Adjudged, that the defendants, The Western New York and Pennsylvania Railroad Company, The New York, Lake Erie and Western Railroad Company, The Delaware and Hudson Canal Company, The Fitchburg Railroad Company, The Boston and Maine Railroad Company, The Lehigh Valley Railroad Company, and The Pennsylvania Railroad Company be, and they severally are hereby, required to base charges for the transportation of refined petroleum oil over their lines upon the actual weight of shipments, whether in tanks or barrels, except in cases where such actual weights cannot be ascertained without great inconvenience, when such a rule or method of estimating weights shall be adopted and employed by them as will practically operate to secure to any shipper of such oil in barrels the transportation of an amount or weight of

freight equal to the amount of weight or freight which, for the same aggregate sum, they contemporaneously carry or offer to carry between the same points for any shipper of such oil in tanks, and that these cases be held open for such further and more specific directions in regard to such assumed or estimated weights as may hereafter appear necessary, and that said defendants and each of them do also abstain from allowing on shipments of petroleum in tank cars a deduction of 42 gallons per tank before freight charges are computed or any such allowance or deduction whatever, unless a corresponding and equivalent concession be made on shipments of such oil in barrels.

"It is Further Ordered and Adjudged, That said defendants be, and they severally are hereby, required to wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel packages on shipment of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York Harbor points, or to Boston and Boston points, or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct, and that on or before the 9th of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges pursuant to the provisions of section 6 of the Act to regulate commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section; and defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for

the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels when the use of tank cars has not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use; and inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary.

"It is Further Ordered and Adjudged, That the rate on shipments or refined petroleum oil, both in tanks and in barrels, over said roads or lines shall be the same, and that said rate from said oil regions to New York points shall not exceed 16½ cents per hundred pounds, nor shall said rate from said oil regions to Boston and Boston points exceed 23½ cents per hundred pounds, and said defendants are hereby required to arrange their tariffs of rates and charges accordingly.

"It is Further Ordered, That a notice embodying this order be forthwith sent to each of the defendant corporations, together with the report and opinion of the Commission herein, in conformity with the fifteenth section of the Act to regulate commerce."

Fifth. The said circuit Court of Appeals erred in holding that these portions of the order of reparation made by the Interstate Commerce Commission and known and designated at the trial as "Exhibit H," which were offered by the plaintiff in error, were wrongfully received in evidence by the Circuit Court, and in reversing the judgment of that Court therefor; such portions so received being as follows:

"Upon a report and opinion filed and by order entered herein on November 14, 1892, the defendants in the above entitled case were required, among other things, as follows:

"To cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; and that, on or before the 9th day of January, 1893, said defendants notify the public accordingly by publication in their tariff of rates and charges, pursuant to the provisions of section 6 of the Act to regulate Commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section.

"And said defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within 60 days after notice of this decision and demand thereof by such parties, all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels, when the uses of tank cars has not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use; and inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary."

"The above mentioned portion of said order has not been complied with by the defendants in these cases in any respect. Upon application of counsel for various claimants seeking reparation under the order, a

hearing to ascertain 'what amounts have been wrongfully received from complainants and others who may be entitled to such reparation' was held at Titusville, Pa., on May 15 and 16, 1894. Proof was then submitted by claimants as to their respective demands, but as copies of the claims presented had not been served upon the defendant carriers, a stipulation was entered into between counsel for claimants and counsel representing the several defendants in this respect, to the effect that the claimants should serve copies of their claims upon the initial carriers, and that thereupon such carriers and the connecting carriers in the several routes would examine and check the various items set forth in the claims and afterwards file the same, together with statements, with the Commission. This operated to delay the proceeding until the terms of the stipulation should be carried out or until the Commission should enter some further order limiting the time of the parties to conform to such agreement. Considerable delay resulted from the failure of the claimants to promptly serve copies of their claims, and the carriers also evinced no disposition to hurry this matter of reparation to a close. This continued until June 10, 1895, when the Commissioner issued an order directing the carriers to complete their examination of claims served under the agreement and file the same with statements thereon not later than June 25, 1895. This time was extended by subsequent order applied for by the Lehigh Valley Railroad Company, until July 15, 1895. The claims which were served upon defendant initial carriers by claimants, the originals or duplicates thereof now being on file in these cases, are the claims to be considered in this report.

"These matters have been regularly heard and the defendant carriers have had full notice and ample opportunity to examine and oppose the claims.

"The defendants have not, as required by our order on November 14, 1892, notified the public by filing and posting oil tariffs, that they or either of them would supply shippers with tank cars for oil transportation to New York harbor or Boston points. Such cars are not and have not been open to the use of shippers generally or any of the defendant roads. On the contrary, before and since the complaints were filed in these cases, it has been the practice of the defendants to hire tank cars of owning shippers by paying mileage thereon, while at the same time denying other and competing shippers the right to use such cars, and compelling them to ship their oil in barrels and pay transportation charges on the weight of the barrel.

"The parties legally entitled to reparation at the hands of the defendants under our order of November 14, 1892, are oil shippers from Titusville, Oil City or points in the vicinity thereof, who were members of the complaining associations at the time the complaints were filed, or subsequently, up to the date of the hearing of these reparation matters at Titusville on May 15, 1894.

"The time which will be considered as properly covered by claims for reparation in these cases is from September 3, 1888, the date when the practice of charging for carrying barrels containing oil was commenced, to May 15, 1894, when hearing on the claims was had.

"The shipments which may be included in the claims are those from Titusville, Oil City and vicinity to New York and New York harbor points and Boston and points taking Boston rates, and which passed over routes in which some one of the defendants was the carrier receiving the freight for transportation, initiating and controlling the method or mode of carriage, and billing the freight through to destination at the aggregate rates of compensation charged.

"The amount to be refunded is the charge collected by defendants for the transportation of barrels containing petroleum oil shipped and carried as aforesaid, and where this barrel charge has not been exactly figured and reported by the defendant initial carrier, such charge will, as found in our Report and Opinion of November 14, 1892, be 14 cents per barrel to New York harbor points and twenty cents per barrel to Boston and Boston points, except where a lower charge per barrel is demanded in said claims.

"Of the various carriers named as defendants in these cases in our order of November 14, 1892, only the Western New York and Pennsylvania and the New York, Lake Erie and Western appear to have been initial carriers for oil shipments mentioned in the claims. These roads have been in the possession of receivers and operated under the direction of United States courts during a portion of the time properly covered by the claims. The affairs of the Western New York and Pennsylvania Railroad Company passed into the hands of Samuel G. De Coursey, as Receiver, on or about April 1, 1893, and said Receiver was operating this road on May 15, 1894, when the hearing of this matter took place. The New York, Lake Erie and Western Railroad Company has been, since on or about July 26, 1893, and still is, operated by receivers appointed and controlled by a Federal Court. The receivers now in possession of the properties of this company are J. G. McCullough and E. B. Thomas.

"Following are the names of claimants, members of the complaining associations, who served their claims upon defendant initial carriers in accordance with the stipulation entered into by counsel for claimants and defendants on May 16, 1894:

Initial carrier,—Western New York and Pennsylvania.
Penn Refining Company, Limited, Oil City, Pa.
John Schwartz & Co., Titusville, Pa.
Rice and Robinson, Titusville, Pa.
Rice, Robinson & Foggan, Titusville, Pa.
Independent Refining Company, Limited, Oil City, Pa.
Genie Wood, doing business under the trade name of
The Oil Creek Refining Works, Titusville, Pa.
American Oil Works, Limited, Titusville, Pa.
Western Refining Company, Limited, Titusville, Pa.
S. Y. Ramage, doing business under the trade name of
The Mutual Oil Company, Reno, Pa.
National Oil Company, Limited, Titusville, Pa.
Continental Refining Company, Limited, Oil City, Pa.
International Oil Works, Limited, Titusville, Pa.

"In accordance with the above stated rulings and principles, we make the following findings and orders upon claims filed and served covering shipments of petroleum oil in barrels to New York and New York harbor points and Boston and points taking Boston rates, and which between the 3rd day of September, 1888, and the 15th day of May, 1894, were delivered by claiming shippers to the Western New York and Pennsylvania Railroad Company or its Receiver for transportation to said destination.

Claim of the Penn Refining Company, Limited, Oil City, Pa.

"The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of eight thousand, five hundred and seventy-nine dollars, ($8,579.00) as reparation for dam-

age resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad from Oil City, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York & Pennsylvania Railroad Company and its said receiver; and the said Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of eight thousand, five hundred and seventy-nine dollars ($8,579.00) together with interest thereon at the rate of six per cent. per annum from May 15, 1894"

Sixth. The said Circuit Court of Appeals erred in ding the following charge to the jury by the trial judge the Circuit Court to have been erroneous and in revers the judgment of that Court therefor; such charge to the y being as follows:

"The questions you are to ascertain are to be passed upon by you under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to

be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this Interstate Commerce Commission."

SEVENTH. The said Circuit Court of Appeals erred in holding the following charge to the jury by the trial judge of the Circuit Court to have been erroneous and in reversing the judgment of that court therefor; such charge to the jury being as follows:

"On the part of the Lehigh Valley Railroad Company it is shown that on February 11th, 1892, it leased its road to the Philadelphia and Reading Railroad Company, which latter continued to operate it under said lease until August 1st, 1893. It is claimed on behalf of said road that for such period no damages can be found against or recovered from it. In view of the fact that under the lease in question the Lehigh Valley Railroad Company was to be paid by the Reading Company a percentage on the gross earnings of the road during the lease, we are of the opinion that the Lehigh Valley Railroad Company was not exempt from liability during the lease, if it was chargeable in other respects, and the plaintiff is entitled to recover against it in other respects. In view, however, of the admission of counsel for plaintiff that they have shown no shipments during said period and claim no reparation for such, it will be apparent to you that the question as to the giving of this lease need not concern the jury, and so I instruct you."

EIGHTH. The said Circuit Court of Appeals erred in holding there was evidence before the Interstate Commerce Commission and also before the said Circuit Court of the Western District of Pennsylvania that part of the amount included in the order of reparation sued upon and in the verdict

of the jury and judgment thereon represented alleged illegal exactions of freight charges received while the Philadelphia and Reading Railroad Company was operating a portion of the through route under a lease from the Lehigh Valley Railroad Company.

NINTH. The said Circuit Court of Appeals erred in not holding and finding the fact to be that no portion of the amount in the order of reparation sued upon was or is for illegal freight charges overcharged the plaintiff in error on shipments of oil over the Lehigh Valley Railroad while that road was under lease to the Philadelphia and Reading Railroad Company.

TENTH. The said Circuit Court of Appeals erred in holding the following charge to the jury by the trial judge of the Circuit Court to have been erroneous and in reversing the judgment of the court therefor; such charge to the jury being as follows:

> "In regard to the defendants, Samuel G. De Coursey, Receiver, and the Western New York and Pennsylvania Railway Company, it appears that the original Company (that is, the Western New York and Pennsylvania Railroad Company), against which this petition was originally filed, on December 4, 1888, went into the hands of Samuel G. De Coursey, as Receiver, on April 1, 1903. Prior thereto, to wit, on the 14th day of November, 1892, an order was made by the Interstate Commerce Commission against the Western New York and Pennsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation. It is alleged, (and upon this point we express no opinion, for you will notice that we leave some facts to be found by you), that thereafter, to wit, on the 22nd day of October, 1895,

an order was made against the Receiver, Samuel G. De Coursey, among others, directing him, as Receiver of the Road, and the Western New York and Pennsylvania Railroad Company, to make reparation to the plaintiff of a specific amount which has been read in evidence before you. It is alleged, that during this proceeding to thus ascertain the amount of reparation to be made, the Receiver was represented by counsel and took part in those proceedings and resisted the entry of the making of such an order. It is also alleged that he was notified of this order of reparation and declined to comply with the same. If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against the Western New York and Pennsylvania Railroad Company, the original company, in other respects, and that the said railroad company united, as explained above, in making a through joint rate with the New York, Lake Erie and Western Railroad Company and the Delaware and Hudson Canal Company, and in so doing subjected refined oil in barrels to an undue and unreasonable prejudice or disadvantage, and that when the company ceased to operate its road and it passed into the hands of a Receiver, such Receiver continued to maintain such rate and declined to obey the desisting and reparation orders, and continued the litigation, then we are of the opinion that by such acts and the adoption of the rate, the Receiver, as Receiver, had so acted that he should not be exempt from the verdict that this jury might find, if in other respects the plaintiff is entitled to recover a verdict. And as, under the decree of this court, under which this road was sold to the Western New York and Pennsylvania Railway Company, the said company was made liable for liabilities incurred by the Receiver, we instruct you that if the plaintiff is entitled, under the foregoing instructions,

to a verdict against the Receiver, the jury should be warranted in also rendering a verdict against the Western New York and Pennsylvania Railway Company."

ELEVENTH. The said Circuit Court of Appeals erred in holding that Samuel G. De Coursey, the Receiver of the Western New York and Pennsylvania Railroad Company was not and is not liable for the amount of the unlawful freight charges overcharged the plaintiff in error on shipments of oil made by it over the Western New York and Pennsylvania Railroad.

TWELFTH. The said Circuit Court of Appeals erred in holding that the Western New York and Pennsylvania Railroad Company was not and is not liable for the amount of the unlawful freight charges overcharged the plaintiff in error on shipments of oil made by it over the Western New York and Pennsylvania Railroad Company.

THIRTEENTH. The said Circuit Court of Appeals erred in holding that the appointment of Samuel G. De Coursey as Receiver of the Western New York and Pennsylvania Railroad Company and his subsequent sale of the road of that company under an order of the court appointing him receiver, effectually prevented any recovery by the plaintiff in error from the said Samuel G. De Coursey, as Receiver, or from the Western New York and Pennsylvania Railway Company of any illegal freight charges overcharged the plaintiff in error on shipments of oil made by it over the Western New York and Pennsylvania Railroad.

FOURTEENTH. The said Circuit Court of Appeals erred in reversing the judgment of the Circuit Court.

FIFTEENTH. The said Circuit Court of Appeals, even if it were justified in reversing the said judgment on some of the several assignments of error filed by the defendants in error, erred in not allowing and awarding a writ of *venire facias de novo.*

S. S. MEHARD,
M. J. HEYWANG,
JOHN B. CHAPMAN,
LEE & MACKEY,
Attorneys for Plaintiff in Error.

Argument.

This cause is the sequel to procedings commenced before the Interstate Commerce Commission, in December, 1888, for the correction of wrongs complained of by the plaintiff, and others in like situation, against the defendants, and others in like fault.

It is based upon the plaintiff's petition to the Circuit Court of the United States for the Western District of Pennsylvania, alleging disobedience by the defendants to an order of the Interstate Commerce Commission made in favor of the plantiff and against the defendants, in that the defendants had neglected and refused to pay to the plaintiff the amount of repaiation required by such order to be paid by the defendants because of wrongs suffered by the plaintiff at the hands of the defendants, in violation of the provisions of the Interstate Commerce Law.

The history of said procedings is briefly as follows:

The Independent Refiners Association of Titusville, Pennsylvania, and the Independent Refiners Association of

Oil City, Pennsylvania, were composed of sixteen independent oil refining companies located in the vicinity of Titusville and Oil City, in the said state of Pennsylvania.

Penn Refining Company, Limited, the plaintiff in error, was one of those companies.

The term "Independent" had reference to the fact that the constituent companies of these associations were not embraced in the Standard Oil Company.

On the fourth day of December, 1888, the said Associations presented their petition to the Interstate Commerce Commission, complaining, *inter alia*, of violations of the Interstate Commerce Law, by the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company, to the injury of the said Refining Companies.

Among the violations so complained of was, that the Oil Refining Companies composing the said Associations were subjected to unjust discrimination and to undue and unreasonable prejudice and disadvantage by the said Railroad Companies in respect to the freight rates charged for hauling oil in barrels from the refineries of said Oil Refining Companies to New York Harbor points, over the through line of railroad formed by the said Railroad Companies under traffic contracts made between themselves.

The wrongs complained of more specifically stated, were:

That for a period of years prior to 1888, refined oil had been carried in barrels, and also in bulk, in cylindrical tanks, firmly and permanently fastened on ordinary freight cars, and during all this period freight had been charged, whether

in barrels or tank cars, solely on the weight of the oil. In the year 1888, without any reason being given therefor, and without any change in prior existing conditions, the railroads began to charge for the weight of the barrel when the oil was shipped in barrels, adding the weight of the barrel to the weight of the oil, and charging the same rate of freight per hundred pounds on both; but when shipped in bulk in cyclindrical tanks, the weight of the oil alone was charged, no charge being made for the weight of the iron tank package. The Independent Refiners were not provided with these tank cars and were unable to provide them for their shipments. The railroads did not furnish tank cars for bulk shipments to the Independent Refiners, but the same were furnished, owned and used almost exclusively by the Standard Oil Company.

This change in rates made a discrimination against the Independent Refiners and in favor of their competitors to New York points of fourteen cents for each barrel of oil, and to Boston and New England points of twenty cents a barrel; and this was complained of by the said Association in their said petition as unjust and as subjecting the said Refining Companies to an undue and unreasonable prejudice and disadvantage.

The Interstate Commerce Commission heard the petitioners and respondents in respect to the matters complained of in the said petiton, and on the fourteenth day of November, 1892, filed their report, with their findings of fact, their opinion and order, wherein the said Commission found that the said complaint was sustained, and ordered the said respondent companies to desist from their unjust discrimination and from exacting the wrongful freight rates, and to refund to the companies complainants, respectively, the amounts wrongfully received; and the Commisison continued

said proceedings for the purpose of enabling the respondents to make the required reparation, and in the event of their failure or refusal so to do, then for the purpose of ascertaining, in the orderly procedure required by the Interstate Commerce Law, the amount of damages or pecuniary reparation to which each of said complainants was entitled.

Said report was "Exhibit D," and said order was "Exhibit E" of plaintiff's petition.

Record, pp. 28-66.

Such reparation not having been made, the Commission thereafter inquired into the amount to which each of said Refining Companies was entitled, and filed their report, with findings of fact, opinion and order, on the twenty-second day of October, 1895.

That report was "Exhibit H" of plaintiff's petition.

Record, p. 69.

The amount so found in favor of Penn Refining Company, Limited, of Oil City, Pennsylvania, was eight thousand, five hundred and seventy-nine dollars, with interest to be added thereto from the fifteenth day of May, 1894, and the same was, by said report and order, assessed against the Western New York and Pennsylvania Railroad Company and Samuel G. DeCoursey, Receiver thereof, and the Lehigh Valley Railroad Company.

Record, p. 80.

Each of said orders was duly served on all the parties in interest, but neither of them was in any measure obeyed by the respondents.

In 1896 the Interstate Commerce Commission presented its petition to the Circuit Court of the United States for the Western District of Pennsylvania, seeking to enforce the said orders against the said respondents and others in like case; but the said court ruled that so much of said orders as related to reparation could not be enforced in the name of the Interstate Commerce Commission, but that the respective Refining Companies would be required to proceed therefor in their own names.

Thereupon the petition of Penn Refining Company, Limited, was presented on the law side of the said Circuit Court, praying for the enforcement of said order of reparation against the Western New York and Pennsylvania Railroad Company and Samuel G. DeCoursey, Receiver thereof; Western New York and Pennsylvania Railway Company and Lehigh Valley Railroad Company,—the said Western New York and Pennsylvania Railroad Company having been reorganized under the name of the Western New York and Pennsylvania Railway Company.

The defendants made answer to the said petition and the issue thus joined between the parties was tried by the said court.

The sole purpose of the said proceedings before the Circuit Court was to enforce the said order of reparation in the manner prescribed by the Sixteenth Section of the Act to Regulate Commerce.

The said trial resulted in a verdict and judgment in favor of the plaintiff and against the respondents for the full amount assessed as reparation in the said order of the Interstate Commerce Commission, with interest from the date fixed therefor in the said Commission, to wit, the fifteenth day of May, 1894,

On the trial of the said cause the court admitted the findings of fact contained in the said reports of the Interstate Commerce Commission, as *prima facia* evidence of such facts; and sought carefully to exclude all findings of law.

The defendants excepted to the admission of certain findings, on the ground that they were of law and not of fact, and some of these exceptions were sustained, on appeal, by the Circuit Court of Apeals for the Third District,—which action of the said Court of Appeals is the subject of complaint in the first and second assignments of error.

The trial court likewise admitted the said orders shown by Exhibits "E" and "H," for the purpose of showing that such orders had been made, but instructed the jury that they were not of binding force upon them; and submitted to the jury all the evidence from which to determine the questions fundamental to a finding which would support the said orders, and especially the order of reparation.

The Court of Appeals, on reviewing said rulings, held that it was error for the trial court to admit the said orders, and held further that the said orders of reparation were invalid.

Said rulings of the court of Appeals are the subject of complaint in the third, fourth, fifth and sixth assignments of error.

The trial court had instructed the jury, in effect, that the lease made between the Lehigh Valley Railroad Company and the Philadelphia & Reading Railroad Company was not efficient to relieve the former company from liability for the said order of reparation, first because the Lehigh Valley Railroad participated in the freight rate under trial, and sec-

ond, because no part of the damage assessed in the said order had accrued during the period of said lease.

The Court of Appeals held this instruction to be error, which is the subject of the seventh, eighth and ninth assignments of error.

The trial court further instructed the jury that if they found the facts necessary to establish the liability of the Western New York and Pennsylvania Railroad Company, which had been found by the Interstate Commerce Commission and covered by said order, and if the wrongful through joint rate existed when Samuel G. DeCoursey was made receiver of said road, and was continued by said receiver, and if he had due notice of said orders and litigation, and continued said wrongful rate as such receiver, declining "to obey the desiting and reparation orders," he would not be exempt from liability for the order of reparation or from the verdict of the jury thereunder; and that inasmuch as the reorganized road, the Western New York and Pennsylvania Railroad Company, was, by the order of sale or of reorganization, made liable for liabilities incurred by the receiver, the said reorganized company would be liable likewise.

This instruction was held to be error by the Circuit Court of Appeals, which ruling is the subject of the tenth, eleventh, twelfth and thirteenth assignments of error.

The Circuit Court of Appeals thereupon reversed the judgment of the court below, which is the subject of the fourteenth assignment of error.

Not only did the Circuit Court of Appeals reverse the judgment of the court below, but reverses the same abso-

lutely, without allowing or awarding a writ of *venire facias de novo,* which is the subject of appellant's fifteenth assignment of error.

The questions raised by the various assignments of error in this case may be stated as follows:

First. Did the trial court err in admitting in evidence the findings shown by the first and second assignments of error?

Second. Did the trial court err in admitting in evidence the orders shown by the third, fourth and fifth assignments of error?

Third. Did the trial court err in charging the jury as to the effect of said orders of reparation, and in failing to hold that the same was invalid?

Fourth. Did the trial court err in the instruction given the jury as to the effect of the lease made by the Lehigh Valley Railroad Company?

Fifth. Did the trial court err in the instructions given relating to the liability of the receiver and of the successor of the Western New York and Pennsylvania Railroad Company?

FIRST.

Did the trial Court err in admitting in evidence the findings shown by the first and second Assignments of Error?

The findings in question are as follows:

> "After full investigation and mature consideration our conclusion in reference to the charge for the barrel package is in line with that in the case of Rice, Robinson and Witherop, and with the principles pertinent to the question laid down in that case and in the case of Rice and Schofield, and we hold that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments, in the absence of the corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions had been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers."
>
> Record, p. 222.

The learned Circuit Court of Appeals recognized the principle that,

> "Whether the charge for the barrel package was reasonable and just, or unjust and excessive, was a question to be decided by the jury on proper evidence,"

adding that such decision was to be made—

"Not on mere arguments and legal conclusions of the Commission."

The criticism therefore made of the action of the court below in admitting the said finding of the Commission was, that it was not a finding of fact, but that it was a matter of legal conclusion.

Was such a criticism just?

What were the statements directly or indirectly contained in the said finding?

They were: First, That the discrimination shown in the case before them was unjust, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage; Second, Because both modes of transportation were employed by the carrier and the use of one, the tank car, was not open to the shippers impartially, but was practically limited to one class of shippers; and; Third, Because the charge for the barrel package in barrel shipments, in the absence of a corresponding charge for the tank shipments, resulting in a greater cost of transportation to the shipper in barrels of like quantities of oil between like points of shipment and destination than the tank shippers; and, Fourth, That no circumstances and conditions had been disclosed by the evidence authorizing such discrimination by any of the defendant carriers.

That paragraph of the report of the Commission was clearly a summarization of facts.

It was a succinct statement of the facts and conditions found which entered into the conclusions of the Commission that the discrimination in question was unjust, and that it

subjected the barrel shipper to an unreasonable disadvantage and gave to the tank shipper an undue advantage.

It is respectfully submitted that the learned Court of Appeals was right in holding that the question, whether the charge for the barrel package was reasonable and just or unjust and excessive, was a question of fact for the jury; but that the learned court erred in holding that the finding in question was one of law.

It is, therefore, further respectfully submitted that the learned trial court committed no error in admitting in evidence the findings in question.

SECOND.

Did the trial court err in admitting in evidence the order shown by the third, fourth and fifth Assignments of Error?

On the trial of this cause before the Circuit Court the orders in question were offered in evidence for a special purpose, as stated in the offer, to wit:

> "27th. As their 27th offer, counsel for plaintiff offer the order made by the Commission as found on pages 122 and 123 of the record.
>
> Offer objected to by counsel by defendants, as not being a finding of fact; the order of the Commission is not evident in the case; and objected to generally as incompetent and irrelevant.
>
> Counsel for plaintiff state that they desire to offer the order, to show what it was that was disregarded and disobeyed by the defendants in the case; the fact that the order was made being already an admitted fact in the pleadings of the case, and they now desire to show what that order was.
>
> Counsel for defendant hold that the Commission had no power to make any order of reparation, the Act of Congress being that the Commission should make its findings of fact and a recommendation for reparation, and they therefor object to the admission of said order."
>
> Record, p. 228.

The ruling by the Court on said offer and objection was as follows:

> "The objections are overruled, and this order is admitted in evidence—not as a finding of fact, but as an act of the Commission in compliance with the statutory powers, and as constituting the ground, or one of the ground upon which the statutory remedy is

based; the order to have no other effect with the jury than simply to show a basis for this present proceeding by petition."

Record, p. 228.

The three orders shown in the Third, Fourth and Fifth Assignments of Error were admitted under the same ruling.

This ruling of the learned Trial Court is to be tested by the Act of Congress under which the proceedings in question were taken.

Section 16 of the Act to Regulate Commerce, as amended March 2nd, 1889, provides, *inter alia*, as follows:

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the Seventh Amendment of the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey to perform the same, after notice given by said commission as provided in the fifteenth section of this Act, it shall be lawful for any Company or person interested in such order or requirement, to apply in a summary way by petition to the Circuit Court of United States sitting as a Court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said Court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it

shall be the duty of the defendants to file their answers to said petition within ten days after the service upon them as aforesaid."

Rev. St. Supp. pp. 688-689

The petition of the plaintiff was duly presented to the Circuit Court of the United States for the Western District of Pennsylvania, pursuant to the provisions of the said 16th Section of this Act of Congress. The petitioner therein averred the proceedings leading up to the said orders, the making of said orders and the disobedience thereof by the defendants.

Record, pp. 6-12.

The defendants filed their answers denying, *inter alia*, as follows:

"Further, this defendant denies that it is guilty of any discrimination between shippers of freight or merchandise, or is liable in any manner to pay any of said complainants any sum whatever for discrimination or unjust charges for freight on carriage of goods and merchandise. That the fact is, and the evidence taken before the Interstate Commerce Commission shows, that all regulations made as to the shipment of commodities complained of in said petition were fair, just and equitable and dealing equally and without discrimination amongst all the shippers, and this respondent denies that it had violated any lawful order or requirement of the Commission created by the Act of Congress in such cases made ad provided."

Record, pp. 132, 133, 134.

The issue in this case was formed by the petition and the answer.

The matters involved in the issue were of fact.

Those facts were to be tried by the jury.

The answer denied the lawfulness of the order or requirement of the Commission which the petition sought to

enforce; and this denial was based upon the further denial that the defendants had been guilty of any discrimination or were liable to pay any sum whatever for discrimination or unjust charges for freight; and upon the averment that all the regulations complained of in said petition were fair, just and equitable, dealing equally and without discrimination among all shippers.

Hence the orders made by the Interstate Commerce Commission entered essentially into the issue which was being tried before the jury.

The answer denied that defendants had been guilty of unjust discrimination, or that they had subjected the plaintiff to any undue or unreasonable prejudice or disadvantage in respect to freight rates, and asserted that all the regulations complained of by the plaintiff were fair, just and equitable.

Whether the regulations referred to worked an unjust discrimination to the wrong of the plaintiff; whether they subjected the plaintiff to an undue or unreasonable prejudice or disadvantage in respect to freights; whether they were fair, just and equitable, were all questions of fact to be determined by the jury.

Texas & Pac. Ry. vs. Interstate Com. Com., 162 U. S., 197, 219.

The decision of those questions of fact would determine whether or not the order for reparation was a lawful order.

The jury, as well as the Court, would have been in the dark as to the very subject which was being tested before them if the orders made by the Interstate Commerce Commission had not been given in evidence.

It is therefore respectfully submitted that the learned Trial Court did not commit error in admitting in evidence the orders in question for the purpose shown by the ruling of the Court.

THIRD.

Did the trial Court err in charging the jury as to the effect of said order of Reparation, and in failing to hold that the same was invalid?

The learned Court of Appeals convicted the Trial Court of error and reversed its judgment absolutely, without a new venire.

The part of the charge to the jury which gave rise to such action upon appeal was as follows:

> "The questions you are to ascertain are to be passed upon by you under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by the Interstate Commerce Commission."
>
> Record, p. 313.

The introductory criticism of this part of the charge to the jury made in the opinion of the Circuit Court of Appeals was as follows:

> "The orders referred to in this instruction included the order of reparation specifying the sum for which action was brought. The statement that the Commission 'may or may not have been justified in making their orders' *was directly calculated to impress the jury with an idea that the lawfulness or unlawfulness of the order of reparation was a wholly immaterial considera-*

tion and should in no way be permitted to influence its deliberations in reaching a verdict. This portion of the charge gives rise to two questions; first, whether it was necessary to a recovery that the order of reparation should have been lawful in whole or in part, and, if so, secondly, whether relief not lawfully embraced in such order could be obtained by the plaintiff below."

Record, p. 313.

In testing the relative merits of the charge to the jury by the Trial Court, and the criticism upon it by the Court of Appeals, it is important to bear in mind what the real issue of fact was.

It has already been seen that the defendants had denied the lawfulness of the order or requirement of the Commission which the plaintiff through his petition sought to enforce: That this denial was based upon the further denial that the defendants had been guilty of unjust descrimination, or were liable to pay to the plaintiff any sum whatever for discrimination or unjust charges for freight; and upon the averment that all the regulations complained of in said petition were fair, just and equitable.

In other words, under the pleadings, the lawfulness of the order of reparation depended upon the determination of the question whether the defendants had been guilty of an unjust discrimination, or of subjecting the plaintiff to an undue or unreasonable prejudice or disadvantage; or whether such regulations had been made only as were fair, just and equitable.

The part of the charge of the Trial Court so quoted in the opinion of the Court of Appeals, and subjected to criticism, must be taken in connection with the context.

When so read it will appear, that *the learned Trial Court did not instruct the jury,*

> "That the lawfulness or unlawfulness of the order of reparation was a wholly immaterial consideration and should in no way be permitted to influence its deliberations in reaching a verdict."

The contention here made on behalf of the appellant is,—

That the true meaning of the instruction of the Court below, and that the impression that instruction was fairly calculated to make upon the jury, were as follows: First,—That the orders in question were admitted in evidence for the purpose of showing that the preliminary steps required by the Act to Regulate Commerce, had been taken: Second,—That the jury was not concluded by those orders, but was to determine for itself whether or not they were justified: Third,—That the jury must take into consideration all of the evidence, and from it determine whether the various elements were established which would fasten upon the defendants the guilt of unjust discrimination by subjecting the plaintiff to an undue or unreasonable prejudice or disadvantage in respect to the freight regulations in question; and if so, to determine to what extent the rate was undue and unreasonable, and to render their verdict accordingly.

On that branch of the case the Trial Court first called the attention of the jury to the proceedings before the Interstate Commerce Commission leading up to the order dated November 14th, 1892, and then to the subsequent proceedings leading up to the order of October, 1895; and in that connection read to the Jury the Finding of the Commission as to the amount of damages resulting to the plaintiff from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels, delivered by the plaintiff to the defendants.

Record, pp. 290-291.

The Court then said to the jury:

"These orders the two Companies named, after notice given to them, did not comply with and th reupon, those interested in the order made an application to this Court, sitting as a Court of law, alleging noncompliance by the Company with the order and praying that a trial of the cause be ordered. Hence it comes that this case is now before you for trial."

In other words, the case before the jury was a proceeding on the matters involved in such order, under the provisions of the 16th Section of the Act to Regulate Commerce.

The Court then proceeds as follows:

"As the right of this Court to assume jurisdiction and of this jury to try the issues depends upon these preliminary steps being taken and the making of these orders by the Interstate Commerce Commisison, we have permitted them to be given in evidence before you, but you will understand, gentlemen, that these orders so made by the Commission have no force or effect on your actions. *The questions you are to ascertain are to be passed upon by you, under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission.* They may or not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by the Interstate Commerce Commission."

Record, p 292.

The clear meaning of that instruction was, that the jury were to determine the facts involved in the issue for themselves, under all the evidence, and that they were not to be controlled by the said orders.

There was nothing said by the Trial Court, either in terms or inference, which meant that it was immaterial whether those orders were lawful or unlawful.

On the contrary, the whole meaning and effect of the instructions of the Trial Court were to test the very question whether or not the order of reparation was a lawful order.

The answer of the defendants denied the lawfulness of that order upon one ground only, to wit, that the defendants had not made an unjust discrimination against the plaintiff, nor subjected the plaintiff to an undue, or unreasonable prejudice or disadvantage in respect to the freight regulations.

The Trial Court having this issue in mind, then proceeded to instruct the jury that, under all the evidence, they must find,

1st. Whether a joint through rate had been established and adopted by the defendants for carrying of refined oil in barrels from the plaintiff's refinery in Pennsylvania to the Seaboard in New Jersey;

2nd. If they found as to that question affirmatively, they should then determine whether the joint through rate so established had subjected the plaintiff to an undue or unreasonable prejudice or disadvantage in respect to the carriage of his oil in barrels; and

3rd. If the jury so found, then to determine to what extent said rate was undue and unreasonable, and to find an amount for the plaintiff accordingly.

Record, pp. 292-293.

Under these instructions the jury found for the plaintiff the exact amount, $8,579.00, which had been assessed in favor of the plaintiff and against the defendants, by the Findings and order of the Interstate Commerce Commission, with interest thereon at the rate of 6 per cent. per annum, from May 15th, 1894,—as stated in said Findings and order of the Commission.

Record, p. 168.

Hence the verdict of the jury vindicated the order of reparation made by the Interstate Commerce Commission, in each and every particular.

It answered in favor of the plaintiff and against the defendants, each and all of the questions raised as to the lawfulness of the said order.

In reference to this subject the Court of Appeals said,

> "This portion of the charge gives rise to two questions; first, whether it was necessary to a recovery that the order of reparation should have been lawful in whole or in part, and, if so, secondly whether relief not lawfully embraced in such order could be obtained by the plaintiff below."
>
> Record, p 313.

What has already been said upon this third branch of the case, is respectfully submitted as an answer to the first question suggested.

With all respect to the learned Court of Appeals, we submit that the reasoning in their opinion filed in this case, and likewise the authorities cited therein sustained the lawfulness of the order of the Commission, in view of the submission by the Trial Court and the Findings of the jury.

On the subject of the legality of the order of the Commission the Court of Appeals said:

> "The lawfulness of an order of reparation does not necessarily depend upon a sufficiency of evidence adduced before the Commission, but upon the existence of facts, whether or not disclosed to that body, warranting the reparation ordered; and in an action brought to obtain such reparation it is enough that such facts be established by proper evidence."
>
> Record, p. 15.

Again,

> "The cause of action is examined *de novo* and the proceeding is in a qualified sense independent of the investigation of the Commission. * * * The Commission in making an order of reparation may have been actuated by insufficient or erroneous reasons and the order nevertheless be valid if it be within the scope of complaint made to that body."
>
> Record, p. 316.

The ruling of the Trial Court was certainly in accord with those expressions of the Court of Appeals.

The Appellant relies upon the authorities cited in the opinion of the Court of Appeals, and especially the case of,—

Interstate Commerce Commission vs. Alabama Midland Ry. 168 U. S. 144, 159.

where this Honorable Court, in considering the words "lawful order" said,

> "The first contention we encounter, upon this branch of the case, is that the Circuit Court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the Court is only authorized to inquire whether or not the Commission has misconstrued the Statute and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the Third Section are questions of fact and not of power, and hence unreviewable. We think this contention is sufficiently answered by simply referring to those portions of the Act which provide that, when the Court is invoked by the Commission to enforce its lawful orders or requirements, the Court shall proceed, as a Court of Equity, to hear and determine the matter, and *in such manner as to do justice in the premises.* * * * It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal, in such cases, that they are not restricted to the evidence adduced before the Commission, nor to a consideration merely of the power of the Commission to make the particular order [illegible] question, and that additional evidence may be put in by either party, and that the duty of the Court is to decide, as a Court of Equity, upon the entire body of evidence."

That case was on the Equity side of the Court. This case is on the Law side. Hence, applying that decision to the one at bar, it follows that it was for the jury to decide the questions entering into the lawfulness of the order, *upon the entire body of evidence.*

As has already been seen, that was the clear instruction given by the Trial Court to the jury in this case.

The second question suggested by the Court of Appeals, and by it answered against the appellant, was as follows:

> "Whether relief not lawfully embraced in such order could be obtained by the plaintiff below."
>
> Record, p. 313.

Counsel for appellant respectfully say that they are unable to see the ground upon which that question was raised in this case, and are unable to follow the reasoning of the opinion of the Court of Appeals to the conclusion that this question must be answered against the plaintiff below and the judgment be reversed absolutely.

If counsel for appellant rightly apprehend the argument of the opinion of the Court of Appeals upon this question, it is: That the Act to Regulate Commerce allows alternative remedies for the recovery of reparation by one suffering wrongs forbidden by said Act: That those remedies are not cumulative, and therefore the injured party must elect which one he will pursue; and that the plaintiff having elected to pursue the remedy by beginning proceedings before the Interstate Commerce Commission, cannot now abandon those proceedings and pursue the other remedy.

Record, p. 317.

The reply to this is:

The appellant began its proceedings before the Interstate Commerce Commission: It followed those proceedings, step by step, as required by the Act to Regulate Commerce, until it was compelled to present its petition to the Circuit Court, as provided by the 16th Section of the said Act: In that

petition it sought to enforce the relief prayed for, on account of the wrongs averred, in its original petition presented to the Interstate Commerce Commission, and established before that body.

The cause of action in the lower Court was identical with the cause of action or complaint made before the Interstate Commerce Commission.

No claim was made nor evidence offered, on the trial of this cause for any reparation save what was embraced in the complaint before the Interstate Commerce Commission.

Every element of the complaint made before the Interstate Commerce Commission was submitted by the Trial Court to the jury, under all the evidence.

The jury considered that under all the evidence, the plaintiff's complaint was sustained and that the plaintiff was entitled to recover the identical amount of reparation assessed by the Commission, and they rendered their verdict accordingly.

It is therefore respectfully submitted that the Trial Court did not commit error in this branch of the case; but that it was error upon the part of the Court of Appeals to reverse the judgment of the Court below, and especially to reverse that judgment absolutely.

FOURTH.

Did the trial court err in the instruction given the jury as to the effect of the lease made by the Lehigh Valley Railroad Company?

This question is raised by the Eighth, Ninth and Tenth Assignments of Error.

The question is not pertinent to the issue in the cases at bar, as none of the excess charges, for which recovery is sought, was exacted during the running of the lease. The statement of plaintiff's claim for overcharge was in court, was offered in evidence and was before the jury.

The Trial Court charged the jury as follows:

> "In view, however, of the admission of the counsel for the plaintiff that they have shown no shipments during said period (the running of the lease) and claim no reparation for such, it will be apparent to you that the question as to the giving of this lease need not concern the jury, and I so instruct you."

Counsel for defendants in commenting upon this admission characterize it as a "novel proposition." Inasmuch as at the time the admission was made, plaintiff's written statement of claim was in court and in evidence, and the correctness of our admission, if then challenged, could have been easily and at once established, and inasmuch as the truth of our statement was *not* then questioned and, as will be seen by reference to pages 297-298 of the Record, no exception was taken by plaintiffs in error to the above portion of the charge, the challenging of the truth of our statement at this late day constitutes the novelty in the case. Is our statement true? The date of the lease is February

11, 1892 (Record p. 253). All shipments, for which recovery is sought from the Lehigh Valley, were made to Perth Amboy. If, then, those shipments were all made prior to the date of the lease, the truth of our statement is established. Mr. Waltz testified (Record p. 273) that shipments to Perth Amboy ceased in the fall of 1891 or spring of 1892. He could not tell exactly which. Mr. Berwald (Record, p. 276) testified that shipments of his company to Perth Amboy ceased in February, 1891. Mr. Byles (Record p. 278) testified that the shipments of his company ceased in the spring of 1892. Mr. Ramage (Record p. 281) in 1891. But if this is not sufficient the plaintiffs in error surely will be satisfied with the testimony of Edward T. Johnson, one of their own witnesses. With the written statement of claim before him and testifying to its contents, this witness (Record p. 287) says the last shipment of the Penn Refining Company to Perth Amboy was January 13, 1891. In addition to all this we attach hereto an "Exhibit of Complainant's Statement" itself and will have the original at the argument. From this, as well as from the testimony of the witnesses as above recited, it will appear that all shipments upon which the complainant seeks recovery were made prior to the making of the lease.

The admission was true and the judge right in withdrawing the questions of the lease from the jury.

It is unnecessary to pursue this inquiry further, but even if the excessive charges for which recovery was sought had been exacted during the time the Philadelphia & Reading Railroad Company operated the Lehigh Valley, we shall still contend that the latter company is liable for such overcharges. The lease to the Reading road did not stipulate for a rental of a fixed sum, *but for a division of the receipts of the road* (Record pp. 256-257).

By the Interstate Commerce Act a public duty was imposed upon the Lehigh Valley to carry all freight without preference. Both the Lehigh and the Reading violated this statute duty, and by the terms of the lease the Lehigh Valley stipulated for a share of the illegal charges collected by the other company. It thereby became a party thereto and liable. Moreover, it is the accepted doctrine of this country that a railroad corporation cannot by a surrender of its road into the hands of a lessee escape performance of any duty or obligation imposed upon it by its charter or the general law of the land. The lessees become thereby but agents of the lessor company, so far as the performance of those duties are concerned.

Railroad Co. vs. Brown, 84 U. S., 445.
Railroad Co. vs. Wyans, 58 U. S., 31.
Clements vs. Canfield, 28 Ver., 303.
I. Redfield on Railroads, 618.
Pierce on Railroads, 283.

FIFTH.

Did the trial court err in the instructions given relating to the liability of the receivers and of the Western New York and Pennsylvania Railway Company, the successors of the Western New York and Pennsylvania Railroad Company?

vania Railway Company, it appears that the original Company (that is, the Western New York & Pennsylvania Railroad Company) against which this petition was originally filed on December 4, 1888, went into the hands of Samuel G. DeCoursey, as Receiver, on April 1, 1893. Prior thereto, to wit, on the 14th of November, 1892, an order was made by the Interstate Commerce Commission against the Western New York & Pennsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation.

The instruction of the learned Trial Court on the branch of the case to which the foregoing question relates was as follows:

"In regard to the defendants, Samuel G. DeCoursey, Receiver, and the Western New York & Pennsyl-

It is alleged (and upon this point we express no opinion, for you will notice that we leave some facts to be found by you) that thereafter, to wit, on the 22nd day of October, 1895, an order was made against the Receiver, Samuel G. DeCoursey, among others directing him, as Receiver of the road, and the Western New York & Pennsylvania Railroad Company to make reparation to the plaintiff of a specific amount, which has been read in evidence before you.

It is alleged that during this proceeding to thus ascertain the amount of reparation to be made, the Re-

ceiver was represented by counsel and took part in those proceedings and resisted the entry of the making of such an order. It is also alleged that he was notified of this order of reparation and declined to comply therewith.

If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against the Western New York & Pennsylvania Railroad Company, the original Company, in other respects, and that the said Railroad Company united, as above explained, in making a through joint rate with the Lehigh Valley Railroad Company, and in so doing subjected refined oil in barrels to an undue and unreasonable prejudice or disadvantage, and that when the Company seized to operate its Road and it passed in to the hands of a Receiver, *such Receiver continued to maintain such rate, and declined to obey the desisting and reparation orders,* and continued the litigation, then we are of opinion that such acts and the adoption of the rate, the Receiver, as Receiver, has so acted that he should not be exempt from the verdict that this jury might find, if in other respects the plaintiff is entitled to recover a verdict. And as *under the decree of this Court,* under which this Road was sold to the Western New York & Pennsylvania Railway Company, *the said Company was made liable for liabilities incurred by the Receiver,* we instruct you that if the plaintiff is entitled, under the foregoing instructions, to a verdict against the Receiver, the jury would be warranted in also rendering a verdict against the Western New York & Pennsylvania Railway Company."

Record, pp. 294-295.

Are the Receivers of the several roads and the reorganized railroad companies liable?

It will be remembered that the wrong complained of is the fixing and giving of a preferential rate to the tank shippers of complainant's competitors unduly discriminating against the barrel shipments made by complainants—acts declared illegal by statute and which the commission had ordered abated and discontinued. The railroad companies, as well as their Receivers, refused to comply with these orders. The Receivers not only refused to comply, but actively adopted and continued the discriminating rates. Nay, more, they appeared before the Commission and contested its orders and defended the suits instituted against the railroads and continued to violate and contest such orders and to maintain the unlawful rates up to the time they sold the railroad property in their charge. Under these facts the Receivers were liable. This liability arises not because of a lien on the railroad property, but from the act of approving, satisfying and aiding an active violation of a statute duty. The eighth section of the Act must be applied to the conduct of the Receiver:

> "That in case any common carrier subject to the provisions of this Act shall *do, cause to be done or permit to be done* any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier *shall be liable* to the person or persons injured thereby, *for the full amount of damages maintained* in consequence of any such violation of the provisions of this Act, etc."

This section imposes liability for the full amount of damages upon any carrier or its Receiver joining in any Act forbidden by the statute. When the Receiver adopted as his own the unlawful act of the company in his charge, by ratifying and continuing the discriminating rates, he be-

came an active party to the commission of a misdemeanor —*particeps criminis*—and liable for the whole damage sustained. This application of the express provisions of the Act is in harmony with the rule of common law, which is that all who aid, command, advise or abet the commission of a tort, or who knowingly take the benefit of it, are liable in the same manner as they would be had they committed it with their own hands.

Berry vs. Fletcher, 1 Dill (U. S.), 67.
Welsh vs. Cooper, 8 Pa., 217.
Judson vs. Cook, 11 Barb. (N. Y.), 642.
Irvine vs. Wood, 51 N. Y., 230.
Horton vs. Heasley, 1 Ired., 165.

It must be born in mind, that the violation of the act complained of was a continuing one. Separate torts were not committed by the railroads and by their Receivers, but the wrong complained of is a continuing one started by the first railroad company, adopted, ratified and continued by its Receiver and by the reorganized corporation. It is the rule, that when the tort is continuous in its nature, both the one who originates and he who continues it are liable and may be joined in an action for damages resulting therefrom.

Wood's Nuisances, Sec. 838.
Irvine vs. Wood, 51 N. Y., 224.
Cobb vs. Smith, 38 Wis., 33.

The Receivers sold the railroads in their charge, and they are now owned and operated by the Western New York and Pennsylvania Railroad Company and the Erie Railroad Company, reorganizations of the old companies. Are they liable? The order of sale made by the Circuit Court of the Western District of Pennsylvania, under which the

Western New York and Pennsylvania Railroad Company purchased reads as follows:

> "Such sale to be subject, however, to all executory contracts made by the Receiver in this suit under the authority of the Court, of which contracts the Receiver is directed to give the Trustee a full and accurate statement; and subject, also, to all the debts and liabilities of the Receiver and to all after maturing interest upon the first mortgage bonds and all car trust obligations and equipment notes now outstanding; such debts and liabilities, if any, will remain a lien upon the premises until dscharged." (Test. p. 83).

This was explicit notice to the purchaser that his bed must be made with a view to the debts and liabilities of the Receiver and that such debts and liabilities would pass with the property into whose hands soever it might pass.

The order of sale of the New York, Lake Erie and Western Railroad (Record p. 333) and the deed to the purchaser (Record p. 337) both contained a provision that the purchaser should take the property subject to the debts and liabilities of the Receiver. The Receivers of the railroads being liable, as we have above shown, for the damages of the complainant refiner, and the sales of the railroad property being made subject to such liabilities, the purchasers, Erie Railroad Company and Western New York and Pennsylvania Railway Company, are liable therefor and are properly joined in this action.

Thompson on Corporations, Vol. 7, Sec. 236.

Cook on Corporations, Vol. 2, Sec. 673.

Calumet Paper Co. vs. Investment Co., 96 Ia., 147.

The Interstate Commerce Commission filed their first report, findings and order on November 14th, 1892.

That order required, *inter alia*,—

> That the respondents cease from charging any rate or sum for carrying the barrel package, on shipments of oil in barrels, or else on reasonable notice promptly furnish tank cars to shippers of oil; and that the respondents refund to the complainants the sums exacted for carrying the barrel package, while the use of tank cars was not open to shippers impartially.
>
> Record, pp. 233-234.

The order of November 14th, 1892, was duly served on the Railroad Companies.

Thereafter, to wit, on April 1st, 1893, a Receiver was appointed for the Western New York & Pennsylvania Railroad Company; and on July 25th, 1893, Receivers were appointed for the New York, Lake Erie & Western Railroad Company.

The order of the Interstate Commerce Commission was not being obeyed and litigation was still pending before the Commission to assess the damages to which the claimants were entitled.

The Receivers continued to maintain the wrongful freight rates, and took part in the litigation in opposition to the assessment of damages.

Record, pp. 209-211.

The questions of fact as to the complicity of the Receivers were fairly submitted by the learned Court below to the jury.

Record, pp. 294-295.

The relation of receivers to the railway company is thus clearly described by Mr. Justice Brown in *McNulta vs. Lochbridge,* 141 U. S., 327:

> "His position is somewhat analogous to that of a corporation sole, with respect to which is held by the authorities that actions will lie by and against the actual encumbents of such corporations for causes of action accruing under predecessors in office. *Pope vs. Plummer,* 2 Humphreys, 500, *Jansen vs. Ostrander,* 1, Cowen, 670. If actions were brought against the receivership generally or against the corporation by name 'in the hands of' or 'in the possession of' a Receiver, without stating the name of the individual, it would more accurately represent the character or status of the defendant. So long as the property of the corporation remains in the custody of the Court, and is administered through the agency of a Receiver, such receivership is continuous and uninterrupted until the Court relinquishes its hold upon the property, though its personnel may be subject to repeated changes. Action against the receiver are, in law, actions against the receivership or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personnel, and judgments against him as receiver are payable only by the funds in his hands."

It thus appears that the question as to the liability of the Receivers is not one as to their personal liability, but only as to the liability of the funds entrusted to them.

The claims in these cases are made up of money which went into the hands of the Receivers themselves, and money which went into the treasuries of the railroad companies immediately proceeding their appointment.

In neither case was it an indebtedness contracted upon the personal credit of the company. On the contrary, the money was wrongfully exacted, and was being paid under protest, with the only alternative upon the part of the claimants of entirely abandoning their business.

This money was not only being taken during the period of the insolvency of the railroad companies, when it would evidently go to the relief of the mortgage-bond holders, but it was being exacted during the pendency of the litigation before the Interstate Commerce Commission, instituted by the complainants to protect themselves from the wrong.

These proceedings were promptly instituted immediately following the establishment of the unjust rate, and the claimants were suffering the wrong through the delays of the law.

The principle upon which funds in the hands of a receiver are held liable for a claim which has accrued, in whole or in part, before the appointment, has been expressed by the Supreme Court of the United States, in the case of *Southern Railway Company vs. Carnegie Steel Company,* 176 U. S., 227, as follows:

> "It is apparent from an examination of the above cases that the decision in each one depended upon its special facts. This Court has uniformly refrained from laying down any rule as absolutely controlling in every case involving the right of unsecured creditors of a corporation, whose property is in the hands of a receiver, to have their demands paid out of net earnings in preference to mortgage creditors. But it may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee when accepting his security

impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of the current receipts before he has any claim upon such income; that, within this rule, a debt not contracted upon the personal credit of the company, but to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt; that whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and the terms of payment, and all other circumstances attending the transaction; and that when current earnings are used for the benefit of mortgaged creditors before current expenses are paid, the mortgaged security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use."

It is respectfully submitted that the facts and circumstances under which the money of the claimants was taken from them by the railroad companies in these cases, are such as to show that their claims do not rest upon the personal credit of the companies, but are of such a special character as to entitle them to payment out of the funds which went into the hands of the receiver.

Did the reorganized Railroad Companies become liable for the claims of the plaintiffs below?

The relation of the reorganized Railroad Companies to the litigation commenced before the Interstate Commerce Commission in these cases, and continued before the United

States Circuit Court for the Western District of Pennsylvania, was considered by the said Court in disposing of the demurrers to the petition of the Interstate Commerce Commission for the enforcement of its order.

The opinion of his Honor, Judge Acheson, in that case, *Interstate C. C. vs. W. N. Y. & P. R. R. Co. et al.*, 82, F. R., 192, was in part as follows:

> "Each of these two new Companies sets up as ground of demurrer to the petition that it was not a party to the proceeding before the Interstate Commerce Commission, and that no order or requirement against it or of it has been made by the Commission. The order, however, here sought to be enforced was made against the old companies to which the Western New York & Pennsylvania Railroad Company and the Erie Railroad Company, respectively, have since become successors. The question then is, are these succeeding Companies to be regarded as strangers to that order? We do not think so. It would indeed be lamentable in a lawful order against unjust discrimination by a railroad company, made by the Interstate Commerce Commission after a protracted investigation, could be nullified by the subsequent reorganization of the Company, or a transfer of its railroad and franchises to another corporation. It is a settled principle that a purchaser of property in litigation, *pendante lite*, is bound by the judgment or decree in the suit. I Story Eq. Jur. Sec. 405. And the rule is said to be founded upon great public policy, for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end of litigation. Id. Sec. 406. *This principle is applicable here.*"

In that case the demurrers were overruled, save that the Court considered there should be a severance as to the

claims for reparation, and that the petition to enforce that part of the order should be brought by the several claimants.

The reorganized Companies acquired the property and franchises of the old Companies upon the expressed condition that the same should continue subject to all the debts and liabilities of the Receiver, which they assumed to pay.

The order of sale in the case of the Western New York & Pennsylvania Railroad Company, provided as follows:

> "Such sale to be subject, however, * * * to all the debts and labilities of the Receiver * * * such debts and liabilities, if any, will remain a lien upon the premises until discharged."

It thus appears that the liability of the receiver was extended to the reorganized company and to the property in its hands.

CONCLUSION.

Prior to the year 1888 the oil business had been greatly extended, not so much in the area of production as in the markets reached and in the methods of transportation. It had long been an important commodity of domestic, interstate and foreign commerce; and the methods of transportation had been improved and the volume transported greatly increased.

As early as 1873 vast combinations of capital had been formed to monopolize its manufacture, transportation and sale. This monopoly was attempted chiefly by securing preferential rates in transportation. Such un-

doubtedly was the reason for introducing the wrong complained of in this case, by charging for the weight of the barrel package which the small independent shippers were compelled to use and making no charge of the weight of the cylindrical tank used by the large shippers having their own tank cars, or having the exclusive use of tanks furnished to them by the Railroad Companies from all points in the oil regions to New York Harbor and Boston and New England points. Forty per cent. of all the oil produced was shipped abroad, and, therefore, rates to the Seaboard were not only important but vital.

At or about that period, or a little later, pipe lines came into use in the transportation of both refined and crude oil. Without their use small independent refiners and shippers could not have lived after they became subjected to the undue and unreasonable preference or disadvantage as against larger shippers, who were given such undue and unreasonable preference or advantage, so that the entire business must inevitably have gone into the control of the one large combination.

Even with the aid of pipe lines, the small, independent refiners and shippers were still compelled to ship the greater part of their refined products in barrels, and many of the independent oil manufacturing plants were driven into bankruptcy, while others, after wasteing a large portion of their capital, only managed to exist without profit.

There was practically no dispute either before the Interstate Commerce Commission, or on the trial in the Court below, as to the facts.

The independent refiners, including the plaintiff in this suit, suffered the discrimination of fourteen cents a barrel

to all New York Harbor points and twenty cents a barrel on shipments to New England and Boston.

The Findings of the Commission, before whom this complaint originated, show:

That for many years prior to September 3rd, 1888, export oil was shipped from the refineries of the oil regions to the seaboard, in barrels and in tank cars, *at a common freight rate for the quantity of oil carried*;
Record, p. 216.

That on September 3rd, 1888, a joint through rate was adopted by the Railroad Companies, discriminating between barrel and tank car shipments, *whereby a charge was made for carrying the barrel while no charge was made for carrying the tanks*
Record, p. 216.

That the charge so made for carrying the barrel *amounted to at least fourteen* (14) *cents a barrel* for New York Harbor points and *twenty* (20) *cents a barrel* for Boston Harbor points:
Record, pp. 216-225-226.

That the barrel was not shipped as an article of merchandise, but served the same purpose merely as the tank—that is, as a package or means of transportation:
Record, pp. 217-218.

That there was no just or reasonable ground, under the circumstances, for discriminating between shipments in barrels and by tank cars; and that therefore the *discrimination made was unjust and unreasonable.*
Record, pp. 217-222.

And that the amount of damages sustained in consequence of such discrimination by the barrel shippers was the excess of the charge made for oil shipped in barrels over that shipped in tanks, to wit, fourteen (14) cents a barrel on shipments to New York Harbor points and twenty (20) cents a barrel on shipments to Boston Harbor points.

Record, p. 235.

The Commission consequently made orders for the relief of the small refiners and shippers from such unjust discrimination, and for the reparation of their wrongs and damages.

Those orders having been disregarded, the plaintiff took the next step prescribed by the Interstate Commerce Act, whereby the issue in this case was formed and finally tried in the Court below.

As has already been shown, the Trial Court submitted to the jury, under the evidence, to find whether the facts were established necessary to sustain the conclusion of the Commission and the order for reparation made by it; and that under such submission the jury rendered a verdict sustaining the findings and order of the Commission in every particular.

As to such submitted the learned Court of Appeals said:

> "There are a number of assignments to portions of the charge and to the refusal of instructions, touching the lawfulness or unlawfulness of the barrel package charges complained of. *These assignments cannot be sustained.* Whether a given transportation charge is just and reasonable, or unreasonable and excessive, is peculiarly a question for a jury. In *Texas & Pac. Railway vs. Interstate Com. Com.*, 162 U. S., 197, 219, the Court said:

'The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality, and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are question not of law, but of fact.'

We perceive no reason why the principle here enunciated should not be applicable to the terms 'unjust and unreasonable' as employed in the first section. Upon the facts disclosed in the record there may be room for a difference of opiaion among intelligent men touching the justness and unreasonableness of the alleged overcharges, and, were it not for error on other points, the question was properly left to the jury."

Record, p. 331.

After thus vindicating the charge of the Trial Court in every particular which went to the merits of the case, the conclusion of the Court of Appeals is then expressed as follows:

"For the reasons herein given, and *particularly in view of the invalidity of the orders of reparation* on which both of the actions are based, and others we have not deemed it necessary to discuss, *the judgment* below in each of the two actions considered *must be absolutely reversed*, with costs; and it is so ordered."

Record, p. 331.

It is respectfully submitted, under the argument hereinbefore made, that no sufficient reasons were given by the learned Court of Appeals for the conclusion that the order of reparation was invalid, or that the judgment must be absolutely reversed;

And that, on the contrary, such conclusion upon the part of the Court of Appeals was error; and that the judgment of the Court below should be affirmed.

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Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 27 OCTOBER TERM, 1906.

PENN REFINING COMPANY, Limited, Plaintiff in Error,

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In Error to the United States Circuit Court of Appeals for Third District.

Brief for Plaintiff in Error, in Reply.

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Brief in Reply.

It is intended here simply to call the Court's attention to some of the evidence bearing upon questions of fact raised by the learned counsel for the appellees, and to some authorities bearing upon the questions of law.

I

The contention is made on behalf of the appellees that they, and especially the Lehigh Valley Railroad Company, had no complicity in the establishment and maintenance of

the wrongful rate complained of; that the said rate was established "in accordance with the usual methods of Railroad Companies," by each stating the charge over its own line, and by adding the two together and thus making a total rate.

Appellees' Book, page 2.

The finding of the Interstate Commerce Commission as to what was done appears in different parts of their report. See record pp. 37-38, 47, 50.

The testimony of Edward T. Johnson, General Freight Agent of the W. N. Y. and P. R. R. Co. in 1888-1894, was in part as follows:

"Q. And there was a through rate of freight covering the shipments from the point of origin?

A. Yes, sir.

Q. And that was governed how?

A. *By a rate of percentage agreed upon by the two companies.*

Q. *Each taking a certain percentage of the through rate* covering its haul?

A. *Yes, sir.*

Q. Do you remember what that rate was?

A. Not exactly; about twenty-five (25) per cent. for the W. N. Y. & P. and seventy-five (75) per cent. for the Lehigh Valley. Those are not the exact figures, but very close to it.

Q. Who fixed the rate accruing to your line, the proportion of the rate accruing to your line?

A. I did.

Q. Had the Lehigh Valley anything to do with it?

A. No, sir; *only to agree to it.*"

Record, p. 240.

The testimony of John Taylor, General Traffic Agent of the Lehigh Valley Railroad Company during the period involved in this litigation, was in part as follows:

"Q. You stated that there was a change in the rate on oil; state if the change was not a change of the general system of charging rates on oil—instead of by the barrel, charging by the weight?

A. Yes, sir.

Q. Formerly the charges had been by the measure or by the barrel?

A. Yes, sir.

Q. And changed the system to weight per hundred pounds, sixteen and one-half (16½) cents to the Seaboard?

A. Yes, sir.

Q. You acceded to that rate when you were notified of the change made?

A. *I objected. I made as strong an objection as I could, but I did accept it, and, for certain reasons, accept it now.*

Q. To whom did you make the objection?

A. To the parties who notified me.

Q. Who is the party with whom you have connection in that line?

A. The W. N. Y. & P. and the Erie and Monticello.

Q. *Did you make any objection to the W. N. Y. & P.?*

A. *No; I found it wouldn't do any good.*"

The record on page 283 shows that the testimony of John Taylor, general freight agent of the Lehigh Valley Railroad Company, given before the Interstate Commerce Commission, as found on pages 159 to 164 of that testimony, was given in evidence; but the testimony of John Taylor is not printed in the record. The part above quoted is taken

from pages 163 and 164 of the testimony adduced before the Interstate Commerce Commission in these cases.

See Appendix to this Brief.

II.

The next ground of defense as found in the brief on behalf of Lehigh Valley Railroad Company, page 2, is that

> "During a portion of the period covered by the award, viz., between February 11th, 1892, and August 1, 1893, the Railroad of the Lehigh Valley Railroad Company had been operated by the Philadelphia and Reading Company as lessee, and *during this period the former Company had nothing to do with the transportation* of any traffic over its lines, and *the receipts derived therefrom had accrued to the latter Company.*"

The reply to this contention is:

(a) The testimony of Edward T. Johnson, general freight agent of the W. N. Y. & P. Railroad Company, and general freight agent of the Receiver, being the initial carrier on the through line in question, shows that the last shipment to Perth Amboy, covered by the findings in this case, was January 13th, 1891.

Record, p. 287.

(b) The same fact appears from the Exhibit used before the Interstate Commerce Commission and upon the trial of this case in the Court below, showing the shipments in barrels to Perth Amboy between October 4th, 1888, and the termination of such shipments, to wit, on January 13th, 1891.

See Exhibit, Record, pp. 347-366.

(c) The wrongful rate was adopted by the Lehigh Valley Railroad Company in September, 1888; it was continued down to and through the period covered by the lease. By the terms of the lease the Lehigh Valley Railroad Company was to share in the proceeds of the said wrongful rate, under the provisions of the said lease marked (E), whereby the lessor was to receive, "during the term, an additional sum equal to fifty per cent of the surplus net earnings."

Record, p. 256.

But the fact was that neither the findings nor order of the Interstate Commerce Commission, nor the verdict of the jury, did include, or could have included, any shipments made during the term of said lease, for the reason, as above shown, that said barrel shipments ceased to Perth Amboy before the term of said lease began.

III.

The next position taken on behalf of the appellees, as stated in the brief on behalf of Lehigh Valley Railroad Company, page 2, is as follows:

> "This through rate to Perth Amboy had been established and maintained at the instance and for the benefit of independent refiners of oil, so called, that is, refiners not allied with the Standard Oil Company interests, and these independent refiners, of whom the plaintiff in error was one, were the only shippers who availed themselves of it and shipped *via* and over the through route made up of the line of the two companies named."

The reply to this position is:

(a) "This through rate to Perth Amboy" was not established at the instance or for the benefit of the independent refiners.

(b) The only ground for the statement made is the testimony of Edward T. Johnson, general freight agent, at the time, of the W. N. Y. & P. Railroad Company.

See Record, pp. 238-239.

(c) Mr. Johnson admitted his error on cross-examination.

See Record, pp. 242-243.

(d) The testimony of John Taylor, general traffic agent of the Lehigh Valley Railroad Company, disproves the statement relied upon.

See Appendix to this brief.

(e) It is likewise disproved by the testimony of the witnesses on behalf of the plaintiff.

Testimony L. Walz, Record, p. 272.

Testimony H. P. Berwald, Record, p. 275.

Testimony D. E. Byles, Record, p. 278.

Testimony S. Y. Ramage, Record, p. 280.

(f) It is likewise disproved by the fact that the through rate in question was announced on September 3rd, 1888. Prompt protests were made against it by the independent refiners, and proceedings were commenced to correct it by petitions presented to the Interstate Commerce Commission as early as December 4th, 1888.

Record, pp. 19-28.

IV.

The next statement relied on for the appellees is that:

"The Standard Oil Company was not a shipper over this through line, and indeed was not a shipper to Perth Amboy or to any New York Harbor point reached by the lines of the Lehigh Valley Railroad Company."

See Brief for Lehigh Valley Railroad Co., p. 2.

The reply to this position is:

(a) The competition between the independent refiners and the Standard Oil Company was not between the oil regions and *Perth Amboy;* but was between the oil regions and the seaboard.

(b) The Standard Oil Company was shipping in tank cars chiefiy to Communipaw—a New York Harbor point near to Perth Amboy.

(c) The wrongful rate, unjustly and unreasonably prejudicial to the barrel shippers, was established at the same time by all through lines leading to the seaboard.

(d) The Standard Oil Company controlled the tank cars owned by itself and used by itself exclusively under contract with the railroads; and likewise controlled the unloading, storage and shipping facilities at Communipaw.

Record, pp. 42-46.

(e) The loss and damage to the plaintiff is not measured by the amount of profit the Lehigh Valley may have made through tank car shipments, but by the amount of injury done to the plaintiff through the wrongful discrimination against tank car shipments.

V.

The brief and argument presented on behalf of the appellees then proceeds to direct the attention of the Court to the fact that the shipments to Perth Amboy were by the Independent Refiners chiefly in barrel shipments, and that their oil was handled at Perth Amboy by a Company known as "The Independent Refiners' Export Company."

Brief for Appellees, pp. 2-3.

It is true the Independent Refiners shipped chiefly to Perth Amboy.

The reason was because they could not ship elsewhere without falling into the hands of the Standard Oil Company.

Record, pp. 45-46.

It is true they shipped by barrel shipments, and that, unlike the Standard Oil Company, they had no tank vessels for the transportation of export oil to Europe; and that during most of the period in question there were no facilities at Perth Amboy for handling tank car shipments—such facilities as were there being in the control of "The United Refiners Export Company."

But it is further true that "The United Refiners Export Company" finally did establish facilities for handling tank car shipments, and that thereupon the said Company changed ownership, and the new owners changed the attitude of said Company toward the Independent Refiners, so that in 1891 they were constrained to stop shipments to Perth Amboy.

Testimony Louis Walz, Record, p. 270.

Testimony S. Y. Ramage, Record, pp. 281, 282.

Testimony D. E. Byles, p. 278.

VI.

The next position taken on behalf of the appellees, in their brief and in the argument of counsel on their behalf, is: That the complaint originally made against the Lehigh Valley Railroad Company and the Western New York & Pennsylvania Railroad Company was only that of an excessive and unreasonable rate; and that the Interstate Commerce Commission held the rate in question to be reasonable.

See Appellee's Brief, p. 4.

In reply to this the attention of the Court is called to the complaint made against the appellee in the petition presented to the Interstate Commerce Commission, paragraphs III., IV. and V.

Record, pp. 20-21.

It will there be found that complaint is specifically made because the respondents had made a rate "per barrel sixty-six cents, *the weight of the package being included and charged therein.*"

> That the said rates and charges subjected the "petitioners and their said traffic to an undue and unreasonable prejudice and disadvantage" * * * so as to "nearly absorb the profit of petitioners in their trade to the said localities, and, under conditions as they exist during some periods of the year and under competition will entirely absorb and destroy all profit in the business of petitioners to said localities, and if continued will compel them to abandon their trade to New York Harbor, and may compel them to close their factories."

And the wrongs complained of in said petition were done by the defendants

> "with the intent of giving to the said Standard Oil Trust an advantage over your petitioners in the manufacture, transportation and sale of their products."

The complaint was certainly broad enough to sustain the findings of the Interstate Commerce Commission and of the jury in the Court below against the appellees. This is especially true in view of the remedial character of the Act to Regulate Interstate Commerce, and the liberal provisions expressly made for the enforcement of the remedy in sections 15 and 16 of the said Act.

The attention of the Court is likewise called to the findings of the Interstate Commerce Commission on the subject of the *reasonableness of* the rate in question.

It will be seen upon an examination of the report of the Commission that the rate was not found to be reasonable so far as it included a charge for the barrel package in shipments; but the Commission *explicitly stated* that their finding on that subject was as to the rates *"exclusive of the charge for the barral package in shipments."*

Record, pp. 47, 55, 56-57.

VII.

The main contention on behalf of the appellants is:

That the freight rate or freight regulation in question was not an unjust discrimination; that it did not make or give any undue or unreasonable preference or advantage to the plaintiff's competitor, nor subject the plaintiff to any undue or unreasonable prejudice or disadvantage; but that it was fair, just and equal.

That proposition was the subject of investigation before the Interstate Commerce Commission from December, 1888, until November, 1892. After hearing the parties fully, after considering the evidence upon both sides and weighing the arguments of law and of fact, the Commission made its report, giving their findings in detail, stating the reasons by which they were governed, and reaching the conclusion that the complaint against the defendants was sustained; that under all the circumstances of the case, the rate whereby a charge was made for the barrel package, when no corresponding charge was made for the tank package, in the transportation of oil from the refineries in the oil regions to the seaboard, was an unjust discrimination; that it gave

an undue and unreasonable preference or advantage to the shipper by tank cars, and subjected the barrel shipper to an undue and unreasonable prejudice and disadvantage.

Report of Commission, Record, pp. 28-65.

The primary order based upon that report is shown by Exhibit E.

Record, pp. 66-68.

Supplemental proceedings were had before the Interstate Commerce Commission for the purpose of ascertaining the amount of reparation to which the injured parties were entitled. The report, with the findings of the Commission on that subject, are shown by Exhibit H.

Record, pp. 69-119.

The defendants and the other respondents in the three petitions presented to the Interstate Commerce Commission by the Independent Refiners, having refused to obey either the desisting order or the reparation order of the Interstate Commerce Commission, suit was brought upon those orders at No. 24 May Term, 1896, in the Circuit Court of the United States of the Western District of Pennsylvania in the name of the Interstate Commerce Commission against all of the said respondents.

The various respondents demurred to that petition, chiefly on the ground that the said orders were not lawful orders.

All of those demurrers were overruled, but the Court considered that each of the injured persons should proceed in its or his own name for the damages covered by the reparation branch of the petition.

See *Opinion I. C. C. vs. W. N. Y. & P. R. R. Co. et al.*, 82 F. R., 192.

Suits were thereupon brought on the law side of the same Court, by petition as provided in the 16th Sec. of the Act to Regulate Commerce, in the name of the various claimants against the several railroad lines complained of.

The defendants again demurred, chiefly upon the ground that the said orders were not lawful orders, and again their demurrers were overruled.

Record, p. 131.

Upon the trial of this case in the Court below the chief contention on behalf of the defendants was that the said order of reparation was not a lawful order for the reason that the rate in question did not subject the plaintiff to an undue or unreasonable prejudice or disadvantage, but that it was fair, just and equal.

That question was submitted to the jury as a question of fact, and under instructions carefully given the jury found the fact in favor of the plaintiff, and against the defendants.

An appeal was taken from the judgment entered upon that verdict, and numerous assignments of error were filed covering the same question.

While the Circuit Court of Appeals reversed the judgment upon other grounds, they overruled all of the assignments of error relating to the question of the lawfulness or unlawfulness of the rate in question.

The ruling of the Court of Appeals on that subject was as follows:

> "There are a number of assignments to portions of the charge, and to the refusal of instructions, touch-

ing the lawfulness or unlawfulness of the barrel package charges complained of. These assignments cannot be sustained. Whether a given transportation charge is just and reasonable, or unreasonable and excessive, is peculiarly a question for a jury. In *Texas and Pac. Railway vs. Interstate Com. Com.*, 162 U. S., 197, 219, the Court said:

'The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality, and as there is nothing in the act which defines what should be held to be due or undue, reasonable or unreasonable, such questions are not questions of law, but of fact.'

We perceive no reason why the principle here enunciated should not be applicable to the terms 'unjust and unreasonable,' as employed in the first section."
Record, p. 331.

The grounds upon which the Interstate Commerce Commission considered the rate in question to be an unjust discrimination are set forth in the report of the Commission and need not be repeated here.

See Record, pp. 28-46, 47, 55-57, 62.

It may not be out of place, however, to add something by way of recapitulation.

The rate complained of affected chiefly the transportation of "Export Oil." That term designates a quality of refined oil which does not find a market, to any great extent, in the United States, but which must be marketed abroad.

In the refining of crude oil about forty per cent of the product is of this grade—a result which cannot be avoided.

The refineries of the Independent Refiners are located chiefly in the neighborhood of Oil City and Titusville, Pennsylvania.

Several lines of railroad had for many years prior to 1888 extended from those oil regions to the seaboard, over which the refined oil was shipped for export.

The Western New York & Pennsylvania Railroad Company was the initial carrier in nearly all of those through lines, one of which was made up of the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad, extending from the oil regions to the seaboard at Perth Amboy, New Jersey. That is the line of the defendants in this particular case.

Record, p. 47.

The chief competitor of the Independent Refiners was the Standard Oil Company. That Company shipped its oil from the oil regions to the seaboard over various lines—shipping chiefly to Communipaw, New Jersey, where the oil was delivered to the National Storage Company, which the Independent Refiners claim was a creature of the Standard Oil Company.

See Record, pp. 45-46.

Refined oil was shipped from the oil regions to the Seaboard in barrels by carload lots and in tank cars—the Independent Refiners using the barrel package almost exclusively, and the Standard Oil Company having practically the exclusive use of the tank cars.

For twenty years prior to September, 1888, all the Railroad Companies had shipped refined oil from the oil regions to the seaboard points at a rate based upon the oil

carried, making no distinction as to the kind of package in which it was carried. Oil constituted a class; and whether carried in wooden packages or in iron packages was the same in weight, bulk and value, and consequently the same freight charge was made therefor. Prior to September, 1888, this had been the unvarying custom of the railroad companies from the time tank cars had nrst come into use.

Record, pp. 37, 50.

The freight rate based upon the quantity of oil without regard to the kind of package was satisfactory to the railroads and just to the parties.

It was just, because if the Railroad carried the iron package free, the wooden package should likewise be carried free. Moreover, the rack-cars in which the barreled oil was transported could be used for other purposes on the return trip, such as the carriage of coal, live-stock and rough freight of various kinds, while tank cars were of use only for the transportation of petroleum oil and had to be returned empty. The rack cars used for this purpose were old cars and were owned by the Railroad Companies; while the tank cars were much more expensive and were owned chiefly by the Standard Oil Company, to whom mileage had to be paid for their use at the rate of three-quarters of a cent a mile for the round trip, making at least $7.50 a car for each trip.

Record, p. 42.

In September, 1888, all of the through lines leading from the oil regions to the seaboard changed their rate by adding a charge for the barrel package amounting to fourteen cents a barrel for New York Harbor points and twenty cents a barrel for Boston Harbor points. As the minimum load allowed for barrel shipments was sixty barrels to the car, this change required the Independent Refienrs to pay

$8.40 for each car on a shipment from the oil regions to New York Harbor points.

Record, p. 37.

The Railroad Companies did not claim that this change was made of consideration for themselves, but claimed that it was made through deference to a ruling of the Interstate Commerce Commission; but when advised by the Commission that they had misconstrued the ruling in question, the Railroad Companies still persisted in charging the new rate, and sought to justify the discrimination on other grounds.

Record, p. 38.

The Commission carefully investigated all the grounds upon which the Railroad Companies sought to justify the charge for the barrel package when no corresponding charge was made for the tank package, and after full consideration, came to the conclusion that those grounds were without merit, and that the said charge gave an undue and unreasonable preference and advantage to the complainants' competitors, and subjected the Independent Refiners to an undue and unreasonable prejudice and disadvantage.

It is respectfully submitted that the facts found by the Interstate Commerce Commission in their report fully justify their conclusion, and that it is apparent that the change made to the disadvantage of the barrel shippers—the Independent Refiners—by all the Railroad Companies at the same time sprang from a single influence, and that that influence was the Standard Oil Company.

A Railroad Corporation is created by the State to serve a public purpose—the transportation of persons and property. Hence the matter of profit is not paramount to all other considerations. Incidentally the incorporators may make

their investment for profit, but primarily the object of the corporation, with its endowment of valuable rights, powers and privileges, is to serve the public.

The mere construction of a completed roadway is not the performance of the railroad's whole duty to the public. A bare track without rolling stock would not serve the purpose of the Company's creation. The further duty remains to furnish such vehicles for transportation as the needs of the public may require.

Chicago, etc., Railroad Co. vs. Dawson, 79 Mo., 296;
Ayes vs. Railroad Co., 71 Wis., 372;
Smith vs. Railroad Co., 12 Allen, 531;
St. Louis, etc., Railroad Co. vs. Dorman, 72 Ill., 506;
Ogdenburg, etc., Railroad Co. vs. Pratt, 89 U. S., 123;
Kohler vs. Railroad Co., 47 Ohio, 130;
Rice vs. Railroad Co., 1 I. C. R. 722.

It being, therefore, the duty of the Railroad Companies transporting oil between the oil regions of Pennsylvania and the seaboard to furnish cars for the transportation of refined oil, it was likewise their duty as public servants to do so impartiality.

In the case at bar that was not done.

The plaintiff owned no tank cars whatever.

The Railroad Companies forming through lines from the oil regions to the seaboard, with the exception of the Pennsylvania Railroad Company, owned no tank cars.

The Pennsylvania Railroad Company owned tank cars, some of which they pretended to offer for the use of the Independent Refiners, but only upon condition that they would ship to Communipaw. That meant a compulsory sale to the National Storage Company, the creature, or at least the servant of the Standard Oil Company.

Record, pp. 45-46.

The tank cars in actual service were chiefly owned and controlled for the exclusive use of the Standard Oil Companq.

Record, pp. 41-43.

The Railroad Companies hired those tank cars from the Standard Oil Company and paid three-fourths of a cent per mile on each car, both going and returning, and by the terms of the contract gave to the Standard Oil Company their exclusive use.

That is to say, the Railroads failed to furnish the vehicles of transportation to all shippers of freight, but rented those of the Standard Oil Company upon the express stipulation that the tank cars should be used only by the lessor, and then charged the lessor only for the naked weight of the oil and not for the iron package in which it was transported, while they not only failed and refused to furnish tank cars to the Independent Refiners, but charged them for the weight of the wooden barrel package in which their oil was transported.

It is respectfully submitted that this was unjust, undue and unreasonable within the meaning of the Act of Congress.

It is no answer to say that the tank cars of the Standard Oil Company were not shipped to Perth Amboy—as we re-

spectfully contend. Perth Amboy was not the point of competition. The competition was between the oil regions of Pennsylvania and the seaboard. Moreover, the measure of injustice done in this case is not the amount of profit made by the Lehigh Valley Railroad Company in transporting the tank cars of the Standard Oil Company, but the amount of injury done to the plaintiff by the unjust rate established by all of the through lines carrying to the seaboard.

Neither is it an answer to say that the Railroad Companies gave to the Independent Refiners like opportunity to ship in tank cars. That they did not do. They simply offered the opportunity *to furnish their own tank cars.*

That was not a performance of their whole duty. If it were it would immediately place shippers with limited means at the mercy of their wealthy competitor, and would result in a monopoly of the Railroads of the country by shippers who could furnish and maintain their own vehicles for transportation.

This point has been well considered in a case similar to the one at bar, by the Supreme Court of Ohio, in *Kohler vs. Railroad Company,* 47 Ohio, 130, a *quo warranto* proceeding brought by the Attorney General of the State against the defendant railroad to oust it from its franchise for wrongful discrimination.

The Court said:

> "A railroad is an improved highway; the public are equally entitled to its use; it must provide equal accommodation for all upon the same terms. The fact that one shipper may be provided with vehicles of his own entitles him to no advantage over his competitor not so provided. No doubt a shipper who owns cars

may be paid a reasonable compensation for the use, so that the compensation is not made a cover for discriminating rates, or other advantages to such an owner as a shipper. Nor is there any valid objection to such owner using them exclusively, as long as the carrier provides equal accommodations to its other customers. It may be claimed that if a railroad company permits all shippers indifferently, and upon equal terms, to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but it is not so in its application to the actual state of the business of the country; for a very large portion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car; the duty of providing suitable facilities for its customers rests upon the railroad company, and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons indifferently and in the order in which its transtation is applied for, it cannot be permitted to suffer cars to be placed upon its track by any customer for his private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were not this so, a mode of discrimination, fatal to all successful competition by small establishments and operators with large and more opulent ones, could be successfully adopted

and practiced at the will of the railroad company and the favored shipper. The advantages, if any, to the carrier presented by the tank car method of transporting oil over that by barrels in box cars in carload lots are not sufficient to justify any substantial difference in the rate of freight for oil transported in that way; but if there were any such advantage, as it is the duty of the carrier to furnish proper vehicles for transporting it, if it failed in this duty it could not in justice avail itself of its own neglect as a ground of discrimination. It must either provide tank cars for all of its customers alike or give such rates of freight in barrel packages, by the car load, as will place its customers using that method on an equal footing with its customers adopting the other method."

The lack of merit in the contention made on behalf of the defendants is shown by the testimony of John Taylor, general traffic agent of the Lehigh Valley Railroad Company, taken before the Interstate Commerce Commission and offered in evidence on the trial of this case in the Court below. It is as follows:

"Q. You are the general freight agent of the Lehigh Valley Railroad Company, are you not?

A. The general traffic agent.

Q. How long have you been connected with that company?

A. Since 1854.

Q. What has been your experience as to the relative danger of transporting oil in tanks or barrels?

A. I usually prefer to haul them in barrels.

Q. At the same price?

A. Yes, sir.

Q. Why?

A. I think it more dangerous to haul them in tanks.

Q. You have to carry the tanks back empty?
A. Yes, sir; and we have to pay mileage on tank cars while on the road.
Q. That is very important?
A. Yes, sir.
Q. You have to pay mileage on those tank cars going and coming?
A. Yes, sir.
Q. Three-fourths of a cent a mile?
A. I believe that is it.
Q. Taking the fact that you have to haul the tank car back empty, the further fact that you pay a mileage rate upon it, the further fact that it is more dangerous on account of fire, *would you not make more money in the transportation of oil in barrels at the same rate than you would of oil in tanks?*
A. *I believe we would.* I am only speaking for the Lehigh Valley road now, for their portion of the line.
Q. The oil that is transported in barrels is loaded into cars which can take back a load?
A. Yes, sir.
Q. Your company is always supplied with cars of that kind, that can handle the business?
A. We have them.
Q. You know, as a fact, that among railroads in this country, there is no railroad except the Pennsylvania that has a general supply of tank cars?
A. I think they are the only one.
Q. Did you ever have any tank cars of your own?
A. Never, except some water cars."

Mr. Taylor thus effectually disposes of this contention and establishes the fact that shipments of barrels were more preferable and satisfactory to the railroad companies than

shipment by tank cars. Why, then, did the Lehigh Valley agree to a rate whereby tank oil was carried more cheaply than barrel oil? On this point Mr. Taylor says:

"Q. Have you any tank cars of your own?
A. No, sir.
Q. That rate on the 3rd of September, 1888, was advanced on barrels to sixty cents, was it not?
A. About that time.
Q. No change was made on tanks?
A. I think not.
Q. Why was that change made of the rate on September 3rd, and by what authority was it made?
A. I don't know what it was made.
Q. It was not made by your company?
A. Not at all; we were not consulted.
Q. Did your company want it made?
A. We were not consulted; we knew nothing about it until after it was made.
Q. How were you advised of the advance?
A. I think I was advised by Mr. Vinney, of the Erie road.
Q. You acceded to that rate when you were notified of the change made?
A. I objected; I made as strong an objection as I could, but I did accept it, and for certain reasons accept it now.
Q. To whom did you make the objection?
A. To the parties who notified me.
Q. Who is the party with whom you have connection in that line?
A. The W. N. Y. & P. and Erie & Monticello.
Q. Did you make any objection to the W. N. Y. & P.?
A. No; I found it wouldn't do any good."

We contend that Mr. Taylor's testimony warrants the conclusion that the through rate to New York was deliber-

ately conceived and fraudulently and unlawfully carried into effect for the purpose of injuring the independent refiners shipping in barrels to the benefit of the Standard shipping in tanks at a favored rate; that the Lehigh Valley strongly objected to this rate, it being against its interests, but that for reasons which, although Mr. Taylor would not state them, are nevertheless clearly understood by all, finally submitted, against its best judgment, to a rate manifestly unjust and illegal.

VIII.

The learned counsel for the appellees contend that it was error for the Interstate Commerce Commission to hold each Railroad Company party to the wrongful through rate liable for the whole amount of damages sustained by the complainants in consequence thereof, and therefore the order in question was unlawful.

The question then arises: Is the Lehigh Valley Railroad Company liable for the whole amount of damage sustained by the plaintiff?

Both the Interstate Commerce Act and the common law answer this question in the affirmative. The eighth section of the Interstate Commerce Act declares:

> "That in case *any common carrier* subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier *shall be liable* to the person or persons injured thereby *for the full amount of damages sustained in consequence of any such violation of the provisions of this act.*"

It is clear that by joining in and adopting the illegal joint tariff and participating in the unlawful excessive charge therein, the Lehigh Valley Company "did or caused to be done or permitted to be done," in the language of the statute, an unlawful act, and, by the very letter of the act, became thereby liable for the "full amount of all damages resulting from such violation of the act." At common law the giving of discriminating rates was a breach of public duty and constituted a wrong in the nature of a *tort*, and an action of trespass would be sustained to recover the excess collected.

Hutchinson on Carriers, Sec. 739.
Augell on Carrier, Sec. 422.
Smith vs. Railroad Company, 49 Wis., 484.
Wood vs. Railroad Company, 23 Ibid., 398.
Graham vs. Railroad Company, 53 Ibid., 478.

It is unnecessary to cite authorities to this court in support of the rule that all parties committing a *tort* are liable jointly and severally for the full amount of the damages sustained.

Counsel for the Lehigh Valley Railroad Company, in support of their contention that only the initial and not the connecting carrier can be held for the wrong done the plaintiff, cite and rely upon the cases of *Insurance Co. vs. Railroad Company*, 104 U. S., 146, and *Deming vs. Railroad Company*, 21 Fed. Rep., 25. Neither of these authorities support such a contention, and both of them are inapplicable to the facts of this case. In both the wrong complained of had been committed *after* the shipment was made. The goods had been delivered to the initial carrier in good order, and while in transit had been damaged by the independent negligence of an intermediate carrier, to which act of

negligence *no one of the other carriers* had been a party. The owner of the goods injured, not desiring to go into the district where the act of negligence had been committed, and knowing that he could not sue the initial carrier as a *tort feasor,* since it had no part in or connection with the negligent act complained of, attempted to hold the initial carrier *ex contractu,* upon the theory that having joined in a joint carriage it thereby became a partner in the transaction and liable to the party injured, not upon the *tort,* but upon the contract obligation of every carrier to carry safely. In each of the cases cited it was held that the carriers who were free from the *tort* were not bound by the supposed contract.

In the cases at bar an entirely different condition of things exists. The wrong complained of is not the separate and independent wrongful act of some one of the transportation companies committed *after* the shipment was made, nor does the complainant attempt to recover upon the breach of some contract express or implied. It complains of a wrong committed *before* the shipments were made, of the breach of a great public duty—the duty of public corporations to carry freight without unjust discrimination; a duty imposed both by the common law and the Interstate Commerce Act. When the Lehigh Valley Railroad Company entered into a joint tariff from Titusville and Oil City to the seaboard, whereby the carrying roads discriminated against the plaintiff in the rates for refined oil in barrels, it was guilty of a breach of this public duty. When the unjust rate was exacted from the complainant it was in pursuance of the agreement already made between the several roads forming the through line. The wrongful act was committed *before* and not *after* the time of shipment. It was not the independent act of one connecting road, but the joint act of all of them, because they all joined in mak-

ing the through rate, and all refused to carry except under it, and when paid each accepted its share thereof. The Lehigh Valley, being an active party to a common *tort*, is liable for the full amount of damages resulting from that *tort*.

IX.

The question as to the liability of the Receiver and the Reorganized Company has been discussed in the Brief already filed, on pages 66 and 76, inclusive. A repetition of the arguments there presented would be out of place here, but they are respectfully and earnestly urged upon the attention of the Court. A brief outline may be stated as follows:

(a) The plaintiff's claim does not arise from contract, nor from an ordinary *tort*. The money owing to the plaintiff was wrongfully taken from him, against his protest and during the pendency of proceedings to prevent it and to reimburse the plaintiff for the exto[illegible].

(b) The injury was a continuing one, commenced by the Western New York & Pennsylvania Railroad Company in September, 1888, which the Receiver adopted and sought to defend.

(c) The money taken thus wrongfully from the plaintiff was either in the Treasury of the Railroad Company when the Receiver was appointed, or it had been used in relief of the Railroad Company.

(d) The question here is not one of the Receiver's personal liability, but of the liability of the funds entrusted to him.

(e) The Receiver voluntarily became a party to the pending litigation and was included as a party in the order of reparation.

(f) That order had been made and litigation before the Interstate Commerce Commission was pending when the sale of said Railroad took place.

(g) The order of Court for the sale of the Railroad required the reorganized Company to assume and pay the liabilities of the Receiver, which, we respectfully contend, included the claim of the plaintiff in this case.

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APPENDIX.

Testimony of John Taylor.

John Taylor, a witness called on behalf of the complainants, being duly sworn, testified as follows:

By Mr. Gowen:

Q. You are the general freight agent of the Lehigh Valley Railroad Company, are you not?

A. The general traffic agent.

Q. How long have you been connected with that company?

A. Since 1854.

Q. You have a joint rate on oil with the Erie Railroad, and with the W. N. Y. & P., have you not?

A. We have.

Q. That rate carried the oil to Perth Amboy, your shipping point?

A. Yes, sir.

Q. You get the oil at Buffalo, do you not?

A. We got the oil from the W. N. Y. & P. at Buffalo; the Erie gives us their oil at Waverly.

Q. Some of that oil that you get at Buffalo you carry by your trains over the Erie road, upon which you have a tracekage to Waverly, and then take it on your own road to Perth Amboy?

A. Yes, sir.

Q. The Erie haul it over their own road, and give it to you at Waverly?

A. Yes, sir.

Q. *That rate, prior to the 3d of September, 1888, was fifty-two cents a barrel?*

A. *I believe it was; yes, sir.*

Q. *Whether in barrels or tanks?*

A. *Yes, sir; either.*

Q. Have you any tank cars of your own?

A. No, sir.

Q. *That rate on the 3d of September, 1888, was advanced on barrels to sixty-six cents, was it not?*

A. *About that time.*

Q. *No change was made on tanks?*

A. *I think not.*

Q. *Why was that change made of the rate on September 3d, and by what authority was it made?*

A. *I don't know why it was made.*

Q. *It was not made by your company?*

A. *Not at all; we were not consulted.*

Q. *Did your company want it made?*

A. *We were not consulted; we knew nothing about it until after it was made.*

Q. How were you advised of the advance?

A. I think I was advised by Mr. Vinney, of the Erie Road.

Q. Your own trains run all the way from Buffalo to Perth Amboy, do they not?

A. Yes, sir.

Q. How many miles?

A. Four hundred and thirty-three.

Q. The bulk of the oil refining business is generally concentrated around tidewater?

A. Yes, sir.

Q. That is due to the introduction of pipe lines as a means of transportation; you could get no business for your road, or they could get no business for the export trade, except you get it in the way you have been getting it from this region?

A. It is all we get. Yes, all we get.

Q. If the rates were advanced high enough to kill out the business here, you would lose all that business?

A. We would.

Q. Were your company in favor of making that advance?

A. As a railroad man, I would be in favor of making an advance. I did not believe it was advisable at the time. My sympathies, of course, ran with these people here. I only heard their side of the case.

Q. You did not believe the business would stand that advance?

A. All the information I could get was that the business would not. You understand, I only heard one side.

Q. You would much rather have the old fifty-two cent rate and be certain of the business, than the sixty-six cent rate that would destroy the business?

A. Of course. Understand, I would rather have the high rate, if we could get it.

Q. *What has been your experience as to the relative danger of transporting oil in tanks or barrels?*

A. *I usually prefer to haul them in barrels.*

Q. *At the same price?*

A. *Yes, sir.*

Q. *Why?*

A. *I think it is more dangerous to haul them in tanks.*

Q. *You have to carry the tanks back empty?*

A. *Yes, sir; and we have to pay mileage on tank cars while on the road.*

Q. *That is very important?*

A. *Yes, sir.*

Q. *You have to pay mileage on those tank cars going and coming?*

A. *Yes, sir.*

Q. *Three-fourths of a cent a mile?*

A. *I believe that it is.*

Q. *Taking the fact that you have to haul the tank car back empty, the further fact that you pay a mileage rate upon it, the further fact that it is more dangerous on account of fire, would you not make more money in the transportation of oil in barrels, at the same rate, than you would of oil in tanks?*

A. *I believe we would.* I am only speaking for the Lehigh Valley road now—for their portion of the line.

Q. The oil that is transported in barrels is loaded into cars which can take back a load?

A. Yes, sir.

Q. Your company is always supplied with cars of that kind, that can handle that business?

A. We have them.

Q. You know, as a fact, that among railroads in this country, there is no railroad except the Pennsylvania that has a general supply of tank cars?

A. I think they are the only one.

Q. Did you have any tank cars of your own?

A. Never, except some water cars.

Q. What were they for?

A. For hauling water when we were out of water at Perth Amboy.

Q. You have had upon your road some serious accidents about the transportation?

A. Yes, sir.

Q. Arising from tanks, or barreled-oil cars?

A. We have had serious accidents with both. The most serious was from the tanks.

Q. Where was that?

A. The most serious was at Slatington.

Q. What was the amount of destruction and loss there?

A. I don't recollect. It was quite large.

Q. There was a great loss of life?

A. I think there were nine or ten people that died from the effects.

Q. That arose from a collision, or running off of the track, of tank cars, and taking fire?

A. Yes. No. I think that they left the switch wrong, so that they ran into the cars that stood on the side track.

Q. Did you have an insurance upon your own property destroyed by fire there?

A. I don't think we carried any insurance.

Q. You are your own insurer?

A. Yes, sir.

Cross-examination by Mr. Hancock:

Q. You stated that there was a change in the rate on oil; state if the change was not a change of the general system of charging rates on oil—instead of by the barrel, charging by the weight?

A. Yes, sir.

Q. Formerly the charges had been by the measure or by the barrel?

A. Yes, sir.

Q. And changed the system to weight per hundred pounds, to sixteen and one-half (16½) cents to the Seaboard?

A. Yes, sir.

Q. You acceded to that rate when you were notified of the change made?

A. *I objected. I made as strong an objection as I could, but I did accept it, and, for certain reasons, accept it now.*

Q. To whom did you make the objection?

A. To the parties who notified me.

Q. Who is the party with whom you have connection in that line?

A. The W. N. Y. & P. and the Erie and Monticello.

Q. *Did you make any objection to the W. N. Y. & P.?*

A. *No; I found it wouldn't do any good.*

No. 27.

Office Supreme Court, U. S.
FILED.
OCT 14 1907
JAMES H. McKENNEY,
CLERK.

~~No. 205. OCTOBER TERM, 1906.~~

IN THE

Supreme Court of the United States

PENN REFINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY AND SAMUEL G. DECOURSEY, THE RECEIVER THEREOF; WESTERN NEW YORK & PENNSYLVANIA RAILWAY COMPANY, AND LEHIGH VALLEY RAILROAD COMPANY, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY AND SAMUEL G. DECOURSEY, THE RECEIVER THEREOF, AND THE WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, DEFENDANTS IN ERROR.

PATTERSON, STERRETT AND ACHESON,
JOHN G. JOHNSON,
For Defendants in Error.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term 1906. No. 285.

Penn Refining Company, Limited, Plaintiff in Error,

vs.

Western New York & Pennsylvania Railroad Company and Samuel G. DeCoursey, the Receiver thereof; Western New York and Pennsylvania Railway Company, and the Lehigh Valley Railroad Company, Defendants in error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY AND SAMUEL G. DeCOURSEY, THE RECEIVER THEREOF, AND THE WESTERN NEW YORK AND PENNSYLVANIA RAILWAY COMPANY, DEFENDANTS IN ERROR.

ARGUMENT.

As the argument advanced upon behalf of the Lehigh Valley Railroad Company deals fully with the objections to the validity of the orders of the Interstate Commerce

Commission as affecting the carriers, whose lines were used by shippers to Perth Amboy, we do not feel justified in submitting a separate brief in support of the objections which have been so fully dealt with in the brief filed upon behalf of the Lehigh Valley Railroad Company. All the objections advanced upon behalf of that company are equally available to the defendants in error upon behalf of whom this brief is filed with the exception of that which relates to the responsibility of the Lehigh Valley Railroad Company for the acts of its lessee the Philadelphia & Reading Railroad Company.

The Commission, however, in its reparation order committed an error which as it did not affect the Lehigh Valley Railroad Company has not been dealt with in the brief of that company, and it is our intention to confine our argument to a discussion of this particular error. The error committed was in directing the payment by the receiver of the Western New York and Pennsylvania Railroad Company of the entire amount awarded the plaintiff in error because of the alleged overcharge made on all of its shipments which shipments were almost wholly if not entirely made prior to the appointment of the receiver.

At the time of the institution of the proceeding before the Interstate Commerce Commission in December, 1888, the Western New York and Pennsylvania *Railroad* Company was in possession of and operating the line of railroad over which the shipments of the plaintiff in error moved en route to Perth Amboy, and the petition consequently was filed against that company. This was still the condition at the time the original order was entered on November 14, 1892.

On April 1, 1893, Samuel G. DeCoursey was appointed receiver of the Western New York and Pennsylvania *Railroad* Company, and on that date took possession of the railroad and property of that company. No steps were ever taken by the complainants in the proceeding then pending before the Commission to make the receiver a party thereto.

On October 22, 1895, the Commission made its reparation order which was directed against both the Western New

York and Pennsylvania *Railroad* Company and Samuel G. DeCoursey, Receiver.

Before the entry of this reparation order the railroad and property formerly of the Western New York and Pennsylvania *Railroad* Company had become vested in the Western New York and Pennsylvania *Railway* Company by virtue of foreclosure proceedings under one of the mortgages of the Western New York and Pennsylvania *Railroad* Company, the *Railway* Company taking the property under the terms of the decree of sale subject to all the debts and liabilities of the Receiver. (Record, p. 237).

In the order of reparation no mention was made of the Western New York and Pennsylvania *Railway* Company, and though it appeared that for a portion of the period covered by the award, the operation of the railroad had been conducted by the Western New York and Pennsylvania *Railroad* Company, and for the balance of the period by Samuel G. M. DeCoursey as receiver, the Commission did not apportion the amount which it directed should be paid to the plaintiff in error upon the basis of the amounts of the alleged overcharge collected by the Railroad Company and the Receiver respectively, but directed re-payment of the entire overcharge by both the Railroad Company and the Receiver.

Upon the trial of the case in the Circuit Court no effort at such apportionment was attempted, and the verdict rendered was a joint verdict against the Railroad Company, the Receiver and the Railway Company, the latter having been included as a party defendant in the action commenced in the Circuit Court for the enforcement of the Commission's award.

Both the Commission and the Circuit Court adopted and acted upon the theory that the Receiver of the property of the Western New York and Pennsylvania *Railroad* Company was liable for the overcharges collected by that Company during the period preceding his appointment.

The Commission did not attempt to justify such a conclusion, but in its report awarding reparation simply adverted to the fact that since April 1, 1893, the railroad of

the Western New York and Pennsylvania Railroad Company had been operated by a receiver, and followed this statement with the following expression of its views as to the responsibility of such receiver.

> "Receivers of railroad companies are common carriers subject to the prohibitions and requirements of and to regulation under the provisions of the act to regulate commerce and any order entered by us requiring reparation to shippers for acts made unlawful by the statute will doubtless be promptly obeyed by receivers of said defendants under direction of the courts from which, respectively, their authority to act was derived."

It should be said in passing that no application was ever made by the plaintiff in error in the receivership proceeding for an order upon the receiver to pay the amount awarded by the reparation order or any part thereof.

The view adopted by the Circuit Court as to the responsibility of the Receiver and of the Railway Company is indicated by the following extract from the charge of the learned trial Judge:—

"In regard to the defendants, Samuel G. DeCoursey, Receiver, and the Western New York and Pennsylvania Railway Company, it appears that the original company (that is, the Western New York and Pennsylvania Railroad Company) against which this petition was originally filed on December 4, 1888, went into the hands of Samuel G. DeCoursey, as receiver, on April 1, 1893. Prior thereto, to wit, on the 14th of November, 1892, an order was made by the Interstate Commerce Commission against the Western New York and Pennsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation.

"It is alleged (and upon this point we express no opinion, for you will notice that we leave some facts to be found by you), that thereafter, to-wit, on the twenty-second day of October, 1895, an order was made against the Receiver, Samuel G. DeCoursey among others direct-

ing him, as Receiver of the road, and the Western New York and Pennsylvania Railroad Company to make reparation to the plaintiff of a specific amount, which has been read in evidence before you.

"It is alleged that during this proceeding to thus ascertain the amount of reparation to be made, the Receiver was represented by counsel and took part in those proceedings and resisted the entry or the making of such an order. It is also alleged that he was notified of this order of reparation and declined to comply with the same.

"If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against the Western New York and Pennsylvania Railroad Company, the original company, in other respects, * * * and that when the company ceased to operate its road and it passed into the hands of a receiver, such receiver continued to maintain such rate and declined to obey the desisting and reparation orders, and continued the litigation, then we are of opinion that such acts and the adoption of the rate, the receiver, as receiver, has so acted that he should not be exempt from the verdict that this jury might find, if in other respects the plaintiff is entitled to recover a verdict. And as, under the decree of this Court, under which this road was sold to the Western New York and Pennsylvania Railway Company, the said company was made liable for liabilities incurred by the receiver, we instruct you that if the plaintiff is entitled, under the foregoing instructions, to a verdict against the receiver, the jury would be warranted in also rendering a verdict against the Western New York and Pennsylvania Railway Company."

Record, page 294.

It appears from this that the receiver was held liable for the overcharges collected by the Western New York and Pennsylvania Railroad Company for the following reasons;

(*a.*) Because counsel representing the receiver took part in the proceedings which eventuated in the order for reparation, and endeavored to prevent the entry of such an order.

(*b.*) Because the receiver, though notified of the order of reparation, declined to comply with the same.

(*c.*) Because the receiver after taking possession of the property continued to maintain the rate on barrel oil which he found in force, and which the corporation had been directed to desist from charging.

The first two reasons do not require, we submit, very exhaustive consideration. It is a novel and indefensible doctrine that a receiver can only resist the establishment of claims against the corporation whose property he is in charge of at the peril of having such claims fastened upon his estate if he is unsuccessful in maintaining a defense, and it is an equally novel and startling doctrine that a receiver makes his estate liable to a claim by declining to pay it.

The third reason for holding the receiver liable has really very little, if any, greater merit than the other two. The fact that the receiver continued the freight rate which he found in force at the time of his appointment did not subject the plaintiff in error to any loss or injury whatever in respect to shipments made prior to the receiver's appointment. Suppose the receiver instead of continuing the charge had at the time of his appointment modified it so as to conform to the views entertained by the Interstate Commerce Commission, it would necessarily then have followed that even under the theory of the law upon which the learned trial judge acted the receiver and the estate in his charge could not have been held liable for the overcharges collected by the Railroad Company during the period preceding his appointment. How, then, can it be claimed with any show of reason or justice that the mere continuance of the charge by the receiver imposed upon the estate in his charge responsibility for loss or injury sustained by the plaintiff in error not as the result of any act of the receiver, but which was wholly chargeable to acts over which he had no control, and for which he was in no sense, therefore, responsible.

Assuming that the charge of freight on the barrel pack-

age was unauthorized, how much was collected through this charge by the railroad company does not appear, nor how much was collected by the receiver, after his appointment, does not appear. The Commission simply charged a lump sum, covering the whole period, against both the railroad company and the receiver. We submit that this is a violation of the well known rules governing the liability of a receiver. The overcharge, if there was one, was in the nature of a tort, and, while it is true it was of statutory origin, yet, we take it, the same rules which govern ordinary cases of recoveries for wrongs done by a corporation, govern in cases of recoveries for violations of the Interstate Commerce Act.

Assuming that the railroad company was guilty of a tort or wrong against the Act, in charging freight upon barrel packages, that wrong ended, so far as it was concerned, on the first day of April, 1893, when its assets and property passed into the hands of the receiver, or, in other words, into the charge and custody of the Circuit Court of the United States. When the receiver was appointed, on the first day of April, 1893, it was as though a new corporation had taken charge. The receiver was but the hand of the court, the assets in his charge became a trust fund, the liabilities which he incurred were to be paid out of that fund; there was, and could be, no common standing between the debts of the corporation which existed prior to his appointment and those which he, as receiver, made after his appointment. The relations were entirely changed; the railroad company had ceased operations; the court had taken charge of the property; the receiver, as the hand of the court, held the assets in trust, first to pay his own charges and operating expenses, and liabilities incurred by him, and, subsequently, to be distributed by him, as the court might direct, amongst the creditors of the corporation which had thus passed into his hands.

To say that a tort might continue from the operations of the railroad company down into and through the operations of the receiver, and that one recovery could be had for the entire tort, and thus a debt of the railroad com-

pany paid as though it were a debt of the receiver, is to ignore the fundamental principles which control the relations of a receiver to the property in his charge.

But how is it possible that, from the mere incident that the overcharge made by the receiver is along the same line as other overcharges made by the railroad company, the latter can be tacked to the former and the whole amount charged as a lump sum against the receiver? If, for example, the receiver had made no such overcharges, if would hardly be contended that the improper collections made by the railroad company would be a claim against the fund in his hands, as a liability of his. We are unable to understand how the mere incident that he did in fact continue to make similar charges on totally different and distinct shipments can make the collections of the railroad company a charge against him. If so, then we submit, that any other series of independent and disconnected torts or wrongs committed in part by a railroad company and in part by a receiver, become preferred claims for a lump amount, by reason of the mere fact that the receiver has done wrongs similar in character and effect to those which the railroad company did before he took charge.

Could a receiver be held liable for injuries sustained by an employee of the railroad company prior to his appointment due to some inefficient and negligent method of operation, simply because the receiver continued this method after his appointment? Or could a receiver be held liable for injuries sustained prior to his appointment resulting from the maintenance by the corporation of a nuisance which the receiver did not promptly upon his appointment takes steps to abate?

Or could a receiver be held liable to a shipper for the loss of goods while in the custody of the corporation because of some negligent method of operation which the receiver upon taking charge of the property failed to correct?

No case can be cited which tends in the slightest degree to support the theory upon which the Circuit Court

acted, and we submit that it is wholly indefensible both upon authority and principle.

Even in the case of claims which are of such a meritorious character that the courts have been led to accord priority to them as against mortgage indebtedness of corporations, the recognition thus accorded has been limited to claims accruing within a short period of the appointment of the receiver, usually six months, while in the present case, under the rulings of the Commission and of the Circuit Court, claims were fastened upon the estate in the receiver's hands which accrued during a period the commencement of which antedated the appointment of the receiver by over four and a half years.

If, as we conceive to be the case, neither the receiver nor the estate in his hands could be made responsible for any overcharges received by the corporation prior to his appointment, it necessarily follows that the Western New York and Pennsylvania Railway Company cannot be held liable for such overcharges, for though by the terms of the sale by which it acquired the property formerly of the Western New York and Pennsylvania Railroad Company, it assumed the debts and liabilities of the receiver, it did not become responsible for the liabilities of the Railroad Company.

The Circuit Court of Appeals held that the receiver was not liable for the overcharges, if any, collected by the Western New York and Pennsylvania Railroad Company, and that, consequently, the order of reparation made by the Commission which directed the re-payment by him of such overcharges was not a lawful order, and for this reason reversed absolutely the judgment against these defendants in error.

For the reasons already indicated we submit that the action of the Circuit Court of Appeals was right and that its judgment should accordingly be affirmed by this Court.

PATTERSON, STERRETT AND ACHESON,
JOHN G. JOHNSON,

For Defendants in Error.

No. 27.

Office Supreme Court, U. S.
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Clerk

IN THE

Supreme Court of the United States.

PENN REFINING COMPANY, LIMITED, PLAINTIFF IN ERROR

vs.

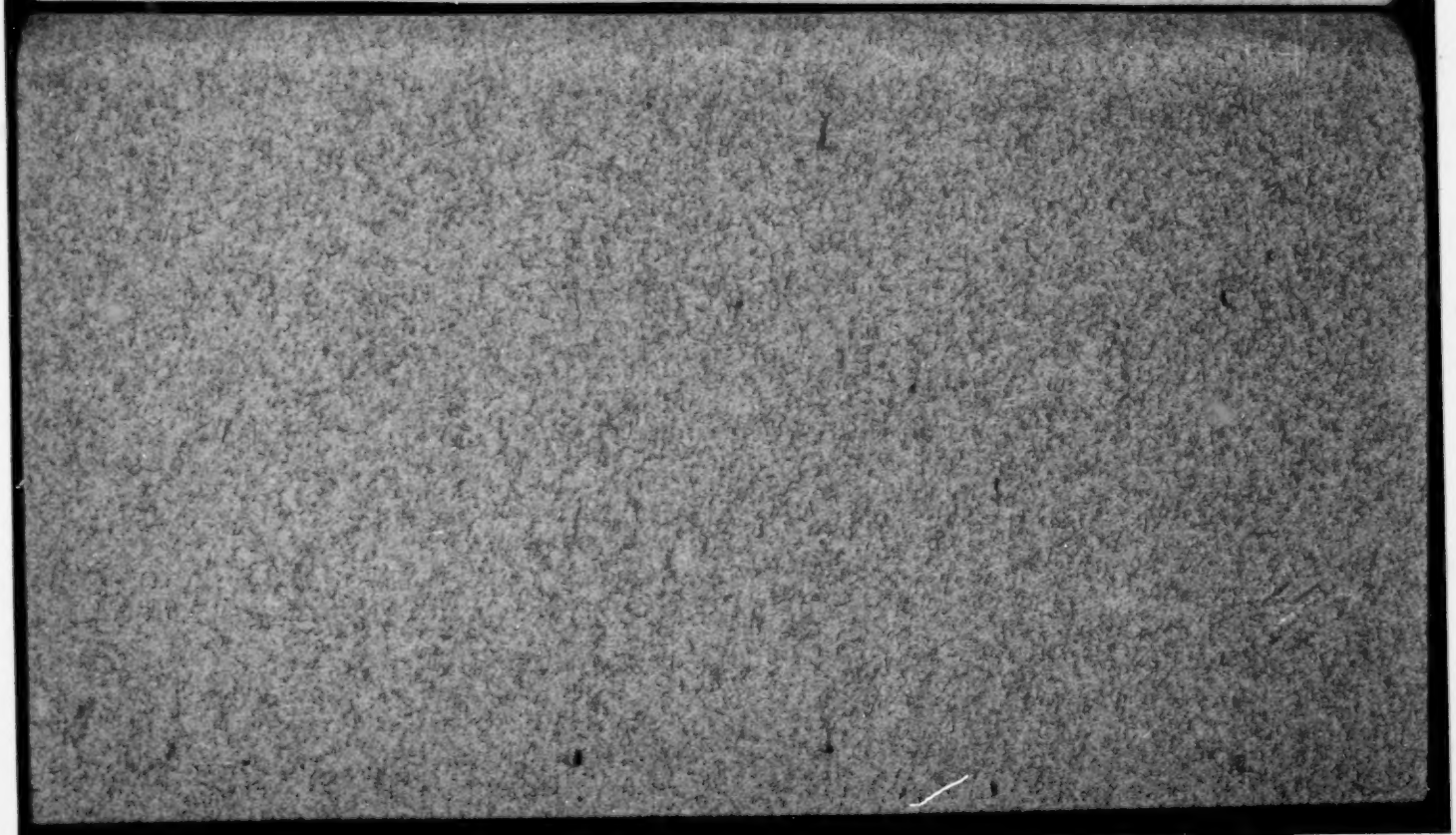
WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY AND SAMUEL G. DECOURSEY, THE RECEIVER THEREOF; WESTERN NEW YORK & PENNSYLVANIA RAILWAY COMPANY, AND LEHIGH VALLEY RAILROAD COMPANY, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF LEHIGH VALLEY RAILROAD COMPANY, ONE OF THE DEFENDANTS IN ERROR.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Lehigh Valley Railroad Company.

Allen, Lane & Scott, Print., Phila.



IN THE SUPREME COURT OF THE UNITED STATES.

October Term 1906. No. 285.

Penn Refining Company Limited, Plaintiff in error

vs.

Western New York & Pennsylvania Railroad Company and Samuel G. DeCoursey, Receiver thereof; Western New York & Pennsylvania Railway Company, and Lehigh Valley Railroad Company, Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF LEHIGH VALLEY RAILROAD COMPANY ONE OF THE DEFENDANTS IN ERROR.

I. HISTORY OF THE CASE.

During the larger part of the period covered by the award of reparation made by the Interstate Commerce Commission—viz., September 3, 1888 to May 15, 1894—the Lehigh Valley Railroad Company had been a party to a through rate on oil from the oil regions of Pennsylvania to Perth Amboy, a point in New York Harbor,

first in conjunction with the Western New York and Pennsylvania R. R. Co., and subsequently with Samuel G. DeCoursey, Receiver of that Company. The Western New York and Pennsylvania Railroad was the initial and the Lehigh Valley Railroad the terminal line.

No joint arrangement for the handling and carriage of this oil traffic existed between the two companies other than that which was involved in the establishment and maintenance of the through rate and the apportionment of the same between the two companies in accordance with the usual methods of railroad companies, parties to through rates.

During a portion of the period covered by the award, viz: between February 11, 1892 and August 1, 1893, the railroad of the Lehigh Valley Railroad Company had been operated by the Philadelphia and Reading Railroad Company as lessee, and during this period the former company had had nothing to do with the transportation of any traffic over its lines, and the receipts derived therefrom had accrued to the latter company.

This through rate to Perth Amboy had been established and maintained at the instance and for the benefit of independent refiners of oil, so called, that is, refiners not allied with the Standard Oil Company interests, and these independent refiners, of whom the plaintiff in error was one, were the only shippers who availed themselves of it and shipped via and over the through route made up of the lines of the two companies named. The Standard Oil Company was not a shipper over this through line and indeed was not a shipper to Perth Amboy or to any New York Harbor point reached by the lines of the Lehigh Valley Railroad Company.

The shipments over this through route to Perth Amboy comprised only oil intended for export, and were practically all barrel shipments as distinguished from tank car shipments, shipment in barrels being necessitated by the fact that no facilities for handling tank oil existed at Perth Amboy, and by the further fact that the shipments abroad were made from Perth Amboy in barrels and not in tank or bulk vessels.

The lines of the Lehigh Valley Railroad Company did not reach any oil territory, and that company was consequently not the owner of any tank cars.

The record does not disclose whether the Western New York and Pennsylvania Railroad Company owned any tank cars, but it does appear that on October 1, 1889, the total number of tank cars owned by railroads in the United States was 1342, of which 1130 belonged to the Pennsylvania Railroad Company, leaving but 212 as the number owned by all the other railroad companies of the country. On the same date the tank cars owned by shippers amounted to 6522, of which, 4378 were operated by the Standard Oil Company interests and 2144 by companies and individuals not connected with the Standard Company. (Record, page 43.)

While the shipments to Perth Amboy were practically confined to barrel shipments a few tank car shipments were made, the proportion between the two being about one hundred cars of barrelled oil to one tank car. These tank car shipments were, however, made in cars which belonged either to the independent refiners themselves or to the company which handled the oil at Perth Amboy, known as "The United Refiners Export Oil Company," which during the period involved in the action was admittedly controlled by interests opposed to the Standard Oil Company and favorable to the independent refiners. Towards the latter part of this period some change in the control of this company took place, and while some of the plaintiff in error's witnesses were inclined to think that as a result of this change the control of the company had been acquired in the interest of the Standard Oil Company, there was nothing to indicate this other than the suspicion or surmise of some of the Independent refiners. Unquestionably during much the larger part of the period covered by the action the United Refiners Export Oil Company was allied with and acted for the independent refiners.

On December 4, 1888, a complaint was filed with the Interstate Commerce Commission by the Independent

Refiners' Association of Titusville Pennsylvania, and the Independent Refiners' Association of Oil City Pennsylvania, these two associations comprising practically all the independent refiners who operated in the oil regions of Pennsylvania, against the Western New York and Pennsylvania Railroad Company, the New York Lake Erie and Western Railroad Company and the Lehigh Valley Railroad Company, complaining of the rates then in force between the oil regions of Pennsylvania and New York Harbor points. The complaint covered rates in force over two through routes, one made up of the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad, the terminal of which was Perth Amboy, and the other of the New York, Lake Erie and Western Railroad and the Lehigh Valley Railroad, but as the shipments made by the plaintiff in error embraced in the present action were made exclusively over the first named route no question is involved in the present case as to rates in force over the route made up of the New York, Lake Erie and Western Railroad and the Lehigh Valley Railroad.

The complaint filed in this proceeding will be found on pages 19 to 22 of the record and an examination of it will show that no complaint whatever was made concerning the practice then in force on the lines of the respondent companies of basing their charges in the case of barrel shipments of oil upon the gross weight of the package. It was not alleged that this practice subjected the complainants' traffic to any discrimination, prejudice or disadvantage as compared with shipments made in tank cars. The claim advanced was that the rate on barrel oil was excessive and unreasonable.

At or about the time of the filing of this complaint two other complaints were filed by the same Associations, to neither of which the Lehigh Valley Railroad Company was made a party. In one of these, which will be found at page 23 of the Record, in which the companies named as respondents were the Pennsylvania Railroad Company and the Western New York and Pennsylvania

Railroad Company, complaint was made of discrimination against the petitioners because of the rates established by the companies respondents therein on barrel and tank shipments, respectively, it being averred in this petition that these rates gave an undue and unreasonable preference and advantage to those shipping oil in tank cars over those shipping in barrel packages.

Testimony before the Commission was taken in the last mentioned case, under an agreement that it should be received in that one, with the understanding that it should apply to the others as far as it should be found applicable. A large amount of testimony was taken, and on November 14th, 1892, the Commission filed its report and opinion. The Commission did not file separate opinions and reports in each proceeding, but filed one general report, entitling it in all three cases and made one general order.

In its report the Commission declined to sustain the causes of complaint set out in the complaint filed in the proceeding to which the Lehigh Valley Railroad Company was a party. The rates on barrel shipments of oil to Perth Amboy were held to be reasonable and not excessive but the Commission did find and report that barrel shippers of oil were subjected to unjust discrimination as against shippers in tank cars, when the charge for barrel shipments was based on the weight of the oil and barrel and the carrier, though transporting tank cars, was unable to furnish such to those of its barrel shippers who were desirous of shipping in tank cars, the view of the Commission being that a railroad company which transported oil in tank cars, no matter to whom these belonged, discriminated against any shipper in barrels desirous of shipping in tank cars and unable to secure these from the company, if the transportation charge made to such barrel shipper was based upon the weight of the oil plus the weight of the barrel package. The Commission did not hold that a carrier who did not transport tank cars was under any obligation to forego its charge on the barrel package; it was only in the judgment of the Commission obliged to do this when it was a transporter of tank cars and failed to furnish such cars to

shippers desirous of shipping in them. The conclusion reached by the Commission was thus expressed:

> "After full investigation and mature consideration our conclusion in reference to the charge for the barrel package is * * * that where both modes of transportation are employed by the carrier, and the use of one, the tank car, is not open to shippers impartially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and destination, than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage, and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers."—Record, page 46.

The order made by the Commission was in accordance with this view of the carriers' obligations, as will appear from the following extract from it:

> "It is further ordered and adjudged that said defendants be, and they severally are hereby, required to *wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York Harbor points, * * * or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein* to such New York Harbor * * * points as said shippers may direct, and that on or before the 9th of January, 1893, said defendants notify the public accordingly by pub-

lication in their tariff rates and charges, pursuant to the provisions of section 6 of the Act to Regulate Commerce, and also file copies of said tariffs with this Commission, as required by the provisions of said section; *and defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties ,all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels when the use of tank cars has not been opened to shippers impartially and the shipper claiming reparation has been thereby deprived of their use;* and inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary."—Record, page 67.

Following this order proceedings were had before the Commission, which resulted in a further order on October 22d, 1895, which determined the amounts payable as reparation and directed payment of the same by the various respondent railroad companies.

The Commission in its report awarding reparation found that the carriers had not "notified the public by filing and posting oil tariffs that they or either of them would supply shippers with tank cars for oil transporation to New York Harbor * * * points," but failed to advert to the fact that its original order directing the posting of these tariffs had not been entered until November 14th, 1892, while the period covered by the reparation order antedated this order by over four years, and further found that tank cars had not been open to the use of shippers generally on the carriers' roads. There was no finding to the effect that the carriers owned any tank cars, but reference was made to the practice of the carriers to "hire tank cars of owning shippers by paying mileage thereon, while

at the same time denying other and competing shippers the right to use such cars." (Record, page 73).

The Commission did not find nor report than any tank car shipments had been made to Perth Amboy, nor was there any finding to the effect that the shipments which the members of these associations had made had been made in barrels because of any inability to secure tank cars.

By the terms of the order as made each of the carriers which participated in the transportation of the oil from the oil regions of Pennsylvania to Perth Amboy was directed to pay the entire amount paid by the plaintiff in error because of the inclusion of the weight of the barrel without regard to the consideration that only a portion of this alleged overcharge had been collected and received by each of such carriers, and the Lehigh Valley Railroad Company was charged with the payment to the plaintiff in error of overcharges paid by it between February 11th, 1892 and August 1st, 1893, a portion of the period covered by the order of reparation, notwithstanding the fact that between the dates named that company had not operated its road, but the operation of the same had been conducted and carried on by the Philadelphia and Reading Railroad Company, as lessee.

The parties against whom this order was directed having failed to make the payment directed the present proceeding for the enforcement of the terms of the order was begun.

ARGUMENT.

We submit and shall contend that neither the original order of the Interstate Commerce Commission directing the carriers affected thereby to desist from basing their charges on the gross weight of the package in the case of barrel shipments of oil nor the subsequent order of reparation made pursuant thereto were lawful orders whether

viewed in the light of the facts found by the Commission or in the light of the evidence adduced at the trial of the cause in the Circuit Court.

The Commission's original order, we submit, was, in respect to the carriers whose lines made up the through route to Perth Amboy, invalid for the following reasons:

1. It held the carriers guilty of discrimination against shippers of oil in barrels because in the case of barrel shipments they based their charges upon the gross weight of the package, when no such cause of complaint had been stated in the complaint or petition filed in the only proceeding before the Commission.

2. It is imposed upon the carriers as a condition to the continuance of a charge which the Commission had found to be of itself reasonable, the duty of furnishing tank cars for shipments of oil to Perth Amboy, an obligation which did not properly rest upon them, and for the non-observance, therefore, of which they ought not to be penalized, and especially in the manner proposed by the order.

3. It required the carriage of like shipments of barrel oil at the same time and under circumstances and conditions identical as to the service rendered, at different rates of charge, and would, if complied with, have established a preferential charge, opposed to the requirements of the Interstate Commission Act, in favor of those shippers in barrels who desired or professed to desire tank cars in which to make their shipments as against those not desirous of so shipping.

And the order awarding reparation for the following additional reasons.

1. Damages were awarded to the plaintiff in error and to the other members of the two associations, complainants before the Interstate Commerce Commission, upon the theory that they had sustained damage because they

had been obliged to ship in barrels due to the refusal or failure of the carriers to furnish tank cars, and that during the period covered by their shipments oil in tank cars had been carried for other shippers at rates which the Commission had found subjected barrel shippers to prejudice and disadvantage, when, as a matter of fact, (*a*) the shipments were made in barrels not because of inability to secure tank cars, but because of conditions with which the carriers had nothing to do, and (*b*) the only oil carried to Perth Amboy in tank cars was that which was transported for members of the associations, complainants before the Commission, and such shipments consequently afforded no basis for the claim or charge that the transportation of such oil, even if under relatively undue preferential rates or conditions, subjected such members to prejudice or disadvantage, unless it be the law—and we submit it is not—that a shipper who secures preferential rates as to one of a large volume of shipments thereby acquires a right to recover from the carrier in respect to all his other shipments on the ground that these had been subjected to discrimination as against the one shipment which had been carried at a lower rate.

2. Each company party to the through rate was directed to pay to the plaintiff in error the entire amount which had been paid by it on shipments made by it to Perth Amboy on account of the weight of the barrel package, regardless of the fact that only a portion of this charge accrued to each company.

3. The Lehigh Valley Railroad Company was directed to refund to the Plaintiff in error sums on account of the charge made for the weight of the barrel package which had been collected and received by the Philadelphia and Reading Railroad Company, which latter company between February 11, 1892 and August 1, 1893, operated the Lehigh Valley Railroad as lessee.

Before considering the objections above indicated to the lawfulness of the Commission's orders the attention

of the court is asked to the view adopted by the learned trial judge in the Circuit Court as to the issues that the court was required to pass upon and determine. This is shown by the following extracts from his charge to the jury.

> "The questions you are to ascertain are to be passed upon by you under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the Interstate Commerce Commission. *They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this Interstate Commerce Commission.*" (Record, page 292.)
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> * * * * * * * *
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> "It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proof, and justly, fairly, and impartially to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established by these two companies (if you find that to be fact), did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage *in any respect whatsoever. If you so find, you will also determine to what extent was the rate undue and unreasonable; and whatever the amount you so find, under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made and on which it had paid the undue and unreasonable amount.*"
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> (Record, page 293.)

It will be seen that in effect the view of the learned judge was that the proceeding in the Circuit Court should be

treated as one *de novo*, and he accordingly instructed the jury that plaintiff in error was entitled to a verdict, even through the Interstate Commerce Commission may not have been justified in making the order which it had made (and such order consequently was not a lawful one, which the court could or would enforce,) if in their judgment the rate on oil in barrels subjected shippers to any undue disadvantage *"in any respect whatsover."* And following these instructions the jury were further told that they should determine to what extent the rate was undue and unreasonable, and that their conclusion in this respect determined the extent of the recovery.

The Commission, it will be borne in mind, had not found the rate on barrel oil excessive or unreasonable. It had found that in applying this rate it was unfair for the carrier, under certain conditions to include the weight of the barrel in ascertaining the weight of the shipment. Under the Court's instructions a verdict for the plaintiff in error was possible, and, indeed, obligatory, if the jury found the rate on barrel oil in any respect whatsoever undue and unreasonable. There cannot be a doubt that under these instructions the jury could and should have rendered a verdict for the plaintiff, even though they should have differed *in toto* from the Commission's conclusions as to the propriety and fairness of charging for the weight of the barrel, if for some other reason they believed the rate on barrel oil which had been charged the plaintiff in error, unjust, and it is equally clear that the amount of their verdict was to be determined not by the charge for the weight of the barrel, but by the amount of the overcharge as ascertained and determined by them.

The Interstate Commerce Act by the ninth section, after providing that any person claiming to be damaged by any common carrier subject to the provisions of the Act, may either make complaint to the Commission or may bring suit in any District or Circuit Court of the United States of competent jurisdiction, goes on to expressly exclude a double remedy in the words following:

"but such person or persons shall not have the right to pursue both of said remedies and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

The view taken by the trial judge absolutely nullifies this provision. The plaintiff in error elected to submit its supposed grievances to the Interstate Commerce Commission, and hence, by the express terms of the enactment, just quoted, was debarred from proceeding in the Courts except to the extent to which the Act authorizes a resort to these courts and that is only for the purpose of enforcing the order of the Commission. But, under the view adopted by the trial judge, the plaintiff in error, having procured an order from the Commission and having come into court for an enforcement of the order, was not to be confined to such a remedy, but was at liberty to obtain from the jury a verdict, not based upon or even in accord with the orders of the Commission, but entirely irrespective of them.

Apart from the conclusive argument against the learned Judge's position, to be drawn from the provision of the ninth section of the Act above quoted it is, it is submitted, clearly apparent from a consideration of the provisions of the Act which deal with the enforcement by the courts of orders made by the Commission, that in such a proceeding the judgment of the court must be one of enforcement or non-enforcement of the order, and not a judgment such as could be rendered in a proceeding commenced *de novo* in the court.

The provisions of the sixteenth section of the Act deal with this matter. Under this section, if the order of the Commission is one as to which a trial by jury is not required, the court's powers are limited by the language of the section to the issuance of a writ of injunction or other process, enjoining obedience upon the part of the carrier to the requirements of such order. A new order cannot be formulated by the Court in the special proceeding authorized by the Act. The proceeding is wholly one for the enforcement of the Commission's order.

There is, however, nothing in the sixteenth section of

the Act which indicates that Congress intended to give any wider or broader power to the courts, when resort was had to the law side thereof for enforcement of the Commission's orders, than they could exercise on the equity side. Indeed, considering the powers of a court of equity to deal fully and finally with any matter of which it takes cognizance, it would seem that greater power should be possessed and exercised on the equity side in moulding the proceeding and the order of the Commission than could be exercised on the law side. But, however this may be, the basis of the proceeding is in both cases the refusal of the carrier to obey a lawful order of the Commission. The party applying to the court must, in either case, allege a violation or disobedience of an order, and certainly it must result from this that the issue before the court is whether there has been a violation or disobedience of a lawful order, and not whether the plaintiff, on the case that he may be able to submit to the court, shall establish a right to a recovery, even though the carrier may succeed in proving that it has not refused to obey any lawful order, and that, hence, no predicate whatever existed for an application to the court.

Can it be that a party who has secured an order from the Interstate Commerce Commission, which has not been obeyed by the carrier against whom it was directed, can take advantage of the special method of procedure before the courts, provided for in such case, the very right to institute which depends upon the existence of a lawful order of the Commission and its disobedience by the carrier, and then be heard to say that while it is true that these conditions must exist, in order to establish the jurisdiction of the court, yet, having once got to the court, upon an allegation that they do exist, he is entitled to recover if he can make out a case, although there may have been no lawful order of the Commission or no disobedience of it by the carrier?

If the proceeding before the court is not limited in its scope to an enforcement of the Commission's order, what are its limitations? Is the plaintiff to be restricted to the

claim advanced before the Commission? Doubtless this will be conceded. But if the proceeding is one *de novo*, and the evidence is not, as it clearly should not be under the decisions, limited to that produced before the Commission, what provision of the Act can be pointed to which would impose even such a limitation as that above suggested? If the legality of the order is not the matter at issue and the court is required to deal with the claim of the plaintiff as presented, there is absolutely nothing in the Act which would restrict his claim to that made by him before the Commission, and he has, therefore, secured for himself what the Act expressly declares he shall not have—a proceeding before the Commission and a trial by a court.

Moreover in submitting the question at issue to the jury in the manner in which he did the learned Judge acted upon a theory or view of the law opposed to that upon which this Court acted in the case of Texas & Pacific Railway Company *vs.* Abilene Cotton Oil Company, 204 U. S. Reports, page 426.

In that case it was held that a shipper could not maintain an action to recover any portion of a tariff rate paid to a carrier upon the ground that it was excessive and unreasonable unless and until the Interstate Commerce Commission had determined the rate to be excessive and unreasonable and that the difference between the rate charged and that found by the Commission to be just and reasonable measured the amount of recovery by all shippers who had paid the tariff rate.

In the present case the plaintiff in error had paid the tariff rate on all shipments covered by the award of reparation. Upon its complaint the Interstate Commerce Commission had condemned this rate as unjust and discriminatory, and the Commission was, therefore, justified upon its theory of the case, in awarding reparation for the overcharge exacted from the plaintiff in error, and if, in the Circuit Court, the jury had been instructed that the question at issue was the right to recover this overcharge no such objection as that we are now considering would have been tenable.

But when the Court instructed the jury that they should find in favor of the plaintiff in error if for any reason they deemed the rate which had been charged (which was the tariff rate,) unjust or unreasonable and that the amount of their verdict should be measured by their conclusion as to the extent to which that rate was undue and unreasonable the rule acted upon by this Court in the case referred to was ignored.

It is true that in that case this Court was dealing with a claim that a schedule rate was unreasonable, whereas in the present case it may be said that the question is whether a schedule rate resulted in discrimination, but the ground upon which this court rested its decision applies equally and quite as strongly to a case of alleged discrimination resulting from tariff or schedule rates as to the case of alleged unreasonable rates.

"If, without previous action by the commission," said this court in the Abilene case, "power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no rea-

son can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only toward reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, comformably to the action of the commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the commission in the premises."

This reasoning, we submit, applies quite as cogently to a case of alleged prejudice or discrimination resulting from the charging of a tariff rate as to a case in which the reasonableness of the tariff rate is the point at issue. One jury might find the rate complained of objectionable upon the score of prejudice or discrimination, while another jury might reach a different conclusion, and in the cases in which the rate was found unlawful, in order to avoid discrimination, the findings of the juries as to the extent of the discrimination would have to accord in all cases, or otherwise the equality of charge would not be attained or secured, an outcome which of course could not be anticipated or counted upon.

Take the present case as an example. One jury might find that the rates on barrel oil were not unjust or discriminatory having regard to the rates existing at the time on oil shipped in tank cars, while another jury might reach the contrary conclusion, and thus the very condition would arise which in the Abilene Company case led this Court to the conclusion that in order to avoid the possibility of such a state of affairs it was necessary to hold that no right of action in respect to the schedule rates which were attacked as unreasonable could be asserted in the courts until the Commission had considered and dealt with the question and determined the extent to which they were unreasonable.

These considerations inevitably lead, we submit, to the

conclusion that the issues properly cognizable in the case were not correctly defined by the learned Judge in his charge to the jury and this was the view adopted by the Circuit Court of Appeals. The conclusions of that Court on this point of the case will be found on pages 313 to 317 of the Record. This view, however, would, if sustained and adopted by this Court, leave open for determination upon a re-trial the question of liability for the amount awarded by the Interstate Commerce Commission to the plaintiff in error. A consideration, however, of the various objections to the lawfulness of the Commission's orders which are set out at the head of this brief will, we confidently submit, lead to the conclusion that the action of the Circuit Court of Appeals which reversed absolutely the judgment obtained in the lower Court was fully warranted.

The first of these objections is that the original or first order of the Interstate Commerce Commission holding the carrier guilty of discrimination was based upon a finding that they had been guilty of a violation of the Interstate Commerce Act in respect to a practice which had not been made the subject of complaint.

In the proceeding to which the Lehigh Valley Railroad Company was a party the alleged relative unfairness of the rates on barrel and tank oil was not made the subject of complaint. The rate to Perth Amboy on barrel oil was attacked as unreasonable because excessive, but there is no averment in the complaint which by any fair construction can be treated or regarded as charging discrimination because of the establishment of rates discriminatory as against the barrel shipper, as compared with the shipper in tank cars.

The failure of the complainants in this proceeding to attack the relative rates on barrel and tank shipments was not an inadvertent omission, but unquestionably was the result of the fact that, as the complainants perfectly well knew, no tank shipments of oil were being made to Perth Amboy except occasional shipments which they

themselves made, and therefore so far as the rates to that point were concerned there was no reason whatever to complain of discrimination practiced by the carriers in favor of tank shippers of oil, when, in point of fact, these tank shippers were non-existent, or if there were any occasional ones, they were the complainants themselves.

The complainants naturally therefore ignored this alleged ground of discrimination entirely when their complaint was prepared and filed.

It probably will not be disputed that the Interstate Commerce Act limits the Commission to the granting of relief sought in and by the petition filed by a complainant.

Section 13 of the Act after providing for the filing of complaints before the Commission provides as follows:

> "If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate *the matters complained of* in such manner and by such means as it shall deem proper."

It may be conceded that a wide latitude should be allowed to the Commission in the investigation of matters brought to its attention, but we submit that the salutary rule that relief can only be granted commensurate with and in consonance with the case stated in the pleadings, should not be relaxed in favor of parties to proceedings before the Interstate Commerce Commission, and as in the present case the findings of the Commission negatived the existence of any just cause of complaint in respect to the matters set out in the petition, it should have been dismissed, and the order should not have been made which the Commission did make, as we believe improperly, because justified by no prior complaint.

The second objection to the order is that it imposed upon the carriers as a condition to their continuance of a charge which the Commission had found to be of itself reasonable, the duty of furnishing tank cars for shipments

of oil to Perth Amboy, an obligation which did not properly rest upon them and for the non-observance, therefore, of which they ought not to be penalized, and especially in the manner proposed by the order.

The Commission's order was apparently based upon the theory that the through rates on oil from the oil regions of Pennsylvania to Perth Amboy, N. J., violated section 3 of the Interstate Commerce Act, which makes it "unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," the alleged violation resulting from the establishment of rates on oil, which, in the case of oil shipped in the tanks of tank cars, was charged for at the net weight of the oil, without including therein the weight of the tank, and in case of oil shipped in barrels was charged for at the gross weight of the barrel and oil.

In considering the question whether the rate thus established did give an unlawful preference to shippers by tank cars, it must not be overlooked that the preference which is prohibited by section 3 of the Act is only such as is "undue or unreasonable."

This Court has had occasion to consider in more than one case what preferences are undue and unreasonable:

> "Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, corporation, or lo-

cality must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the Act.

* * * * * * *

"The third section forbids any undue and unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; and as there is nothing in the Act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions, not of law, but of fact. The mere circumstance that there is, in a given case, a preference or an advantage, does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

Mr. Justice Shiras in Texas & Pacific Railway Company *vs.* Interstate Commerce Commission, 162 U. S., page 197.

"The position of the respective persons and classes between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partially

resulting in undue advantage to one or undue disadvantage to the other, in order to constitute unjust discrimination."

Mr. Justice Brown in Interstate Commerce Commission *vs.* Baltimore & Ohio Railroad Company, 145 U. S., page 282.

"The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference, arising from the voluntary and wrongful acts of the carriers complained of, as having given undue preference, and does not relate to acts, the result of conditions wholly beyond the control of such carriers."

Mr. Justice White in East Tennessee, Virginia & Georgia Railway Company *vs.* Interstate Commerce Commission, 181 U. S., page 19.

Applying the rule then, that in determining whether a preference accorded to an individual or locality is undue or unreasonable, "those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable," and that it is only preferences which are the result of wrongful and partial acts of the carrier which are prohibited is it a fact that the original order of the Commission, which determined that the carriers should not charge any shipper for the weight of the barrel package who was desirous of shipping in tank cars, and who had made due demand therefor, was based upon findings that did give due consideration and weight to the interests of the carrier. Our contention is that their interests were entirely ignored in order to prevent what the Commission thought to be a preference resulting to shippers in tank cars, from the basis of charging adopted by the carriers and that the effect of the Commission's order was to impose a limi-

tation upon the right of the carriers against whom it was directed to charge reasonable freight rates, which should not justly have been imposed.

The Commission's conclusion is necessarily based upon the existence of an obligation upon carriers who transported any tank cars no matter by whom owned or by whom delivered to the carrier to furnish tank cars to shippers desiring the same. We submit that no such obligation exists in respect to carriers generally and especially as to carriers in the situation of the Lehigh Valley Railroad Company.

In dealing with this question it must be borne in mind that the Lehigh Valley Railroad did not reach the oil regions, and that not a pound of oil originated on its line; that all the oil that it transported was delivered to it by connecting lines, which might at any time divert all such traffic from its lines. It is not surprising that under these circumstances it had no tank-car equipment of its own, and we submit it was not required to supply itself with such.

The obligation of a carrier in respect to furnishing equipment is fully discharged when it has supplied itself with that which is requisite to take care of the traffic originating on its own line, and this obligation is not enlarged nor extended because a carrier becomes a party to a through rate covering transportation over its own line and the lines of other companies. It does not thereby assume nor impose upon itself any obligation to the shippers whose traffic may be handled under this through rate other than that which is involved in the movement of the same over its own line.

The Lehigh Valley Railroad Co. was under no obligation whatever to supply itself with tank cars for the use of shippers located on the line of the Western New York and Pennsylvania Railroad and even if it had been the owner of tank cars it was not obliged, we submit, to furnish these to such shippers. It will hardly be contended by any one that a shipper on the line of the Western New York and Pennsylvania Railroad could have any claim for damages because of the refusal of the Lehigh

Valley Railroad Company to furnish him with tank cars for shipment of his oil, for no duty rested upon the Lehigh Valley Railroad Company to furnish him with such cars, or, indeed, with cars of any description. But if there was no such duty how can it fairly be claimed or argued that the Lehigh Valley Railroad Company should be restrained from charging a proper sum for the carriage of oil in barrels, even granting that the shipment was so made because of the inability of the shipper to secure tank cars from the initial line. No matter in what light we may regard the question of the obligation of the initial line in respect to furnishing tank cars the same conclusion would seem to result as to the effect upon the Lehigh Valley Railroad Company of its failure or refusal to furnish these. If it is not the duty of an initial line to furnish tank cars, then clearly neither the Western New York and Pennsylvania Railroad Company nor the Lehigh Valley Railroad Company could be lawfully deprived of any of the revenue which they were justly entitled to receive from barrel shipments because of the failure of the former Company to furnish tank cars, while on the other hand, if it is the duty of an initial line to furnish these cars, how can it be fairly claimed that the Lehigh Valley Railroad Company should have adjusted its tariff rates on oil shipments upon the theory or assumption that the initial line would fail in the performance of its duty?

If there had been no joint rate in force it is not conceivable that the Interstate Commerce Commission would have held that the Lehigh Valley Railroad Company must forego a portion of the charge which the Commission had found was proper, as against shippers of oil in barrels who were shipping in this way, only because of their inability to secure tank cars from another company. If the case had been presented in this form to the Commission it cannot be doubted that it would have reached the conclusion that whatever may be the obligations of an initial line the Lehigh Valley Railroad Company could not properly be penalized for the failure of such line to conform to or observe the same.

The following extract from the opinion and report of the Commission awarding reparation clearly indicates that its conclusion that the Lehigh Valley Railroad Company should be penalized for failure of the Western New York and Pennsylvania Railroad Company to furnish to its shippers tank cars, was rested solely upon the proposition that by becoming a party to a through rate with that company, the Lehigh Valley Railroad Company in some way, not very clearly pointed out by the Commission, assumed or came under some responsibility or obligation to shippers located on the line of the Western New York and Pennsylvania Railroad Company:

"It may be urged," said the Commission dealing with the point that no other than an initial carrier was in a position to furnish cars to shippers, "as an objection to our construction of the statute in these cases, as affecting oil transportation generally over connecting lines, that while an intermediate or terminal carrier in a line may be in a position to furnish tank cars to its own shippers, it may while so doing, be unable to provide such cars for shipments over its road from points on the roads of connecting carriers having no tank cars, and that to compel it to carry the barrel package free in shipments received from carriers having no tank cars, would be unjust. But there would not be any force in such an objection. *When connecting carriers make a through route and establish through rates which apply as single charges for the whole service, they hold out themselves as carriers over such route at such rates, and must be prepared to furnish suitable instrumentalities of shipment and carriage, so that the transportation may be conducted without wrong or injustice to those who desire to use the through line.*" Record, page 75.

A complete answer to this is that carriers who join in establishing through routes and through rates do not thereby become responsible for each others acts or omissions, and even if this were not so it would by no means follow that carriers who joined in establishing a through rate thereby assumed any responsibility to shippers not on their own lines in respect to equipment. To hold

otherwise would result in converting a joint engagement to carry into one to furnish equipment also. But this theory of the Commission will be referred to later on in connection with the order of reparation.

The reasons which induced the conclusion reached by the Commission as to the obligation of carriers to furnish tank cars, or failing to do this to forego a portion of a reasonable charge for the carriage of oil in barrels, are thus stated by the Commission.

> "It is not the business of the shipper to furnish the vehicle of transportation. That is the duty of the carrier. Under its franchise the carrier must do more than construct his roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open. *If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do; he must either furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates. For all transportation purposes, so far as the public is concerned, a carrier makes every vehicle his own that he uses upon his road, no matter how acquired. His responsibility to the public is the same in respect to rates and other transportation duties whether he owns or hires his vehicle. When, therefore, he accepts tank cars owned by shippers who can afford to build and furnish them, and has none of his own to furnish to other shippers, but can supply only box cars in which barrels must be used for oil, he is bound to see that he gives no preference in rates to the tank shipper, and that he subjects the barrel shipper to no disadvantage. It is at this point that the duty of the carrier to the public is rigorous, and where no plea of inability to furnish tanks, or other excuse, is admissible."* Record, Page 40.

The Commission when it used this language could have had in mind no other than an initial carrier and it

dealt with the question entirely from the standpoint of such carriers obligations, and while even as to such carriers the Commission's conclusions cannot, we submit be supported, the situation of carriers on whose lines the traffic does not originate but who are concerned in its transportation only because their lines in conjunction with the line of the originating carrier form through routes over which the traffic moves, is so radically and essentially different in every respect as to make the Commission's reasoning totally inapplicable to such carriers.

The whole argument of the Commission is rested upon the proposition that a carrier who voluntarily accepts for transportation over its line a shipment made in a certain kind of car provided and owned by the shipper must be regarded, *qua* its other shippers, as the owner of that car, and that consequently it must furnish similar cars to such of its other shippers as are desirous of shipping in the same, or if it is unable to do this it must so adjust its rates as to relieve these other shippers from payment of any sum in excess of that which they would have paid had the carrier been able to furnish to them the special kind of car desired.

But is it not clear that in order to make this proposition applicable to any carrier, two elements must be present,—one, the voluntary acceptance by the carrier of the special kind of car under conditions which, adopting the Commission's reasoning for the purpose of the argument, would make that car part, for the time being, of the carrier's equipment, and, second, an obligation of the carrier to furnish to such shippers cars or vehicles of transportation.

Neither of these elements are found in nor can they be fairly imported into a case where the carrier whose duty or obligations are to be determined is not the initial carrier. An intermediate or terminal carrier in a through line which accepts cars from the initial line for transportation over its line does not thereby become the owner of such cars in any sense whatever, and even in respect, therefore, to its own shippers would not, by the acceptance and movement of such

cars, be obliged to add to its own equipment cars of a similar kind. But upon no possible theory can it be fairly held that the acceptance and movement of such cars creates any such liability or responsibility in respect to shippers located on the line of the initial carrier.

If the Lehigh Valley Railroad Company by moving tank cars which had been provided by the Western New York and Pennsylvania Railroad Company and loaded by shippers on the line of that Company thereby became the owner of such cars in the sense upon which the Commission acted in this case, and as a consequence of this a duty was imposed upon the former Company to see to it that cars of like character were furnished to all other shippers on the line of the Western New York and Pennsylvania Railroad Company who were desirous of using them, a like duty must devolve upon it as to shippers on all lines no matter how remote whose shipments move over its lines under through rates of freight. No distinction can be made as between the line of one carrier which may connect immediately with the line of the carrier whose obligations are involved, and the line of another carrier which may be connected only by intervening lines, for it is not the contiguity of the lines but the acceptance by a carrier of cars and their movement over its own line upon which the theory rests upon which the Commission acted in the present case. Logically followed out and applied this theory would result in an extension and enlargement of a carrier's obligation with respect to the character and extent of the equipment to be furnished by it which has never yet been asserted or acted upon by any legal tribunal, and which, it is confidently believed, never will be adopted as the measure of a carrier's obligation.

But even in the case of an initial carrier, the theory of the Commission cannot, it is submitted, be sustained. A carrier should not be obliged to furnish the same kind of equipment to all shippers on its line, that some particular shipper may have thought it to his interest to acquire for the carriage of his own goods. It is undoubtedly the duty of the carrier to furnish reason-

able equipment, but it is not obliged to furnish more than this. In the case of tank cars, the Commission has found that out of about 7864 owned in the United States, but 1342 were owned by railroad companies, and of these latter, 1130 were owned by the Pennsylvania Railroad Company, thus leaving for all other companies but 212. (Record, page 43.) It is apparent, therefore, that this class of car was not in general use, and that when it was used, it was generally supplied by the shipper. The reason for this is apparent from the Commission's own findings. In order that a shipper may make use of a tank car, there must be special facilities both for loading and for unloading and the railroad companies do not control or own such facilities.

In the nature of things, these facilities must be owned by the shippers, and by the owners of the terminals at which the oil is unloaded into tanks or other receptacles. These cars, therefore, can be used only by a certain class of shippers, and the fact that of the almost eight thousand cars owned in the United States in 1889 only thirteen hundred and forty-two were owned by others than shippers, is very persuasive that the conditions affecting tank shipments were such as to impose the obligation upon shippers, desiring to avail themselves of this peculiar method of transportation, of themselves furnishing the vehicle or car.

The obligation to furnish tank cars which the Commission attempts to deduce from the mere transportation by a carrier of cars of that character belonging to shippers is rested by it upon the purely arbitrary theory or proposition that a carrier who transports any species of car for a shipper thereby makes that car its own, and consequently imposes upon itself an obligation to furnish cars of a like character to all shippers desirous of securing them.

Referring to the argument that no obligation was imposed upon a carrier to furnish a tank car simply because it transported such cars for shippers, the Commission said:

"In fact and in law, however, the carrier furnishes the tank as well as the barrel car. The shipper in tank cars (who is also the owner) is only a source of supply. He does not, strictly speaking, furnish the tank car, but lets it to the carrier, charging and receiving the customary mileage both ways, and the carrier, the hirer, furnishes it."

It is upon this purely fanciful and artificial basis that the Commission rests its conclusion that a carrier who transports tank cars must be prepared to supply these upon demand to shippers not owning them, and in order to arrive at this conclusion the Commission distorts the relations which properly exist between the carrier and the owner of a tank or other car, and thus arrives at a conclusion as to these relations which is opposed to and at variance with the actual facts of the case.

The carrier who accepts and transports a car which belongs to a shipper does not thereby become the owner or hirer of such car any more than it does of a car of some other railroad company which it receives and transports in the ordinary course of business. On both these kinds of cars mileage is paid but this is not paid by the carrier in order to secure the possession or temporary use of the car—for in many cases it would prefer to utilize its own equipment—but is paid in order to compensate the owner of the car for its temporary use by the carrier always at the instance of the owner.

Take the case of a carrier which has equipped itself with an adequate equipment for the handling of the traffic which is likely to be offered to it.

It receives from some shipper or from some connecting line a special kind of car which it may think unsuited for the economical transportation of traffic. If the theory of the Commission is right that by accepting and transporting this car the carrier must be regarded as the owner of it, and consequently under obligations to furnish cars of a like character to any shipper making demand upon it for such, the mere fact that it moves this

car over its line imposes upon the carrier an obligation to purchase cars of this character, although its own equipment is sufficient and adequate for the needs of its shippers and although it may deem the particular kind of car unsuitable for its purposes.

We may concede a carrier's duty to furnish adequate equipment but this we submit does not involve an obligation to furnish cars of every pattern or description that it transports for others. This obligation does not rest upon it and the Commission erred in predicating its order upon such a theory.

If then carriers merely by transporting tank cars belonging to others are not obliged to themselves arquire and furnish such cars to shippers who are desirous of using them, the Commission was not justified in ordering the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company to reduce the joint rate on barrel oil to Perth Amboy, this reduction. concededly having been directed because in the Commission's opinion the shippers of barrel oil were obliged to ship in this way to their disadvantage because of a failure on the part of the carriers to observe the obligations resting upon them in respect to furnishing tank cars.

But we further submit that even upon the assumption that a carrier is in default who is unable to furnish tank cars to shippers desirous of utilizing them, the Commission in the present case was not justified in directing the carriers to reduce their rates on barrel oil.

If the Western New York and Pennsylvania Railroad Company or the Lehigh Valley Railroad Company failed to observe any obligation resting upon them as to furnishing equipment they might become liable to would-be shippers for damages resulting therefrom. But any such failure on their part would afford no justification for an order directing the reduction of rates on barrel oil below those which would be fairly compensatory to the carrier, and which would bear a proper relation to the rates on tank oil, and the Commission, therefore, in the present

case erred, we contend, in holding that if the carriers were not able to furnish tank cars their rates on barrel oil must be reduced in order that shippers shipping in barrels might be put upon an equality with shippers using tank cars.

If the conditions were such as to justify lower charges for the movement of his oil, to the tank than to the barrel shipper, can it be justly contended that because the carriers recognized this fact, they should be adjudged guilty of "partiality" to the tank shipper and of a wrongful act to the barrel shipper? What were the conditions affecting the two methods of shipment as found by the Commission itself?

First.—That the rates charged and received for the carriage of oil shipped in barrels, were not unreasonable and did not afford more than a reasonable return for the service rendered.

This conclusion is, of course, involved in the finding of the Commission, which permits the carriers to continue to charge for the weight of the barrel, provided they furnished tank cars to shippers making demand therefor.

Second.—That in charging for the weight of the package, the carriers but followed the usual practice.

> "It is not intended to hold, nor should this report be construed to hold, that, aside from other controlling circumstances, the carrier in hauling packages is not entitled to pay according to the weight thereof. It is simply held that on account of the peculiar circumstances in these cases, to charge for the weight of the barrel places barrel shippers at a disadvantage as against tank shippers, and the practice in these cases while the circumstances and conditions remain unchanged, should be condemned." (Extract from Commission's Report. Record, page 65.)

Third.—That the carriage of oil in tank cars was more profitable to the carrier than its carriage in barrels, even

when the weight of the barrel was included in the paying freight.

> "It is also maintained that the transportation in tanks yields the carrier a larger revenue above the cost of service than that in barrels. In support of this contention, tables showing dead and paying weight hauled in tank cars carrying oil in bulk and in box cars carrying oil in barrels, respectively, were introduced in evidence on the part of the defendants, and it appears therefrom that the amount of freight hauled in the average tank car is greater than that in the average car loaded with barrels, and that in consequence the revenue to the carrier is somewhat greater in the former than in the latter, even when the barrel package is charged for, and is, of course, still greater where no charge is made for the barrel package. It is estimated by one of the witnesses that the present rate of sixteen and one-half cents per one hundred pounds to New York points, the carrier would receive, on an average train load, the barrel package being charged for, $35.76 more for the transportation of oil in tanks than in barrels, and excluding the charge for the barrel package, $237.20 more. Without affirming the strict accuracy of these tables and estimates, it may be conceded the evidence shows the amount of paying freight to be materially greater in tank shipments than in barrel shipments." (Extract from Commission's Report. Record, page 39.)

Fourth.—That where facilities existed for unloading tank cars (and, of course, tank cars would only be sent to such points), these cars could be handled at terminal points more expeditiously and, consequently, more cheaply than box cars loaded with barrels.

> "It is claimed that in case of special facilities at loading and unloading points, the tank cars are handled more rapidly than cars carrying oil in barrels. This may be true, but the testimony is that

> the railroads do not provide these facilities, and there are none at the seaboard of which the complainants can avail themselves. When special facilities for loading and unloading tank cars are not available, greater delay occurs than in loading and unloading barrel cars." (Extract from Commission's Report. Record, page 38.)

Giving to all these considerations their due weight, is it not indisputable that there was lacking in the present case that "substantial identity of situation and of service" as well as the "partiality resulting in undue advantage" which this Court in the case of Interstate Commerce Commission *vs.* Baltimore and Ohio Railroad Company, above referred to, declared must be found existent before a carrier could be convicted of discrimination forbidden by the Interstate Commerce Act.

Take the identical case which is now before the Court and consider the position of the Western New York and Pennsylvania Railroad Company, the initial carrier.

It had in force a rate on barrel oil of 16½ cents per hundred pounds to Perth Amboy, and under the practice which prevailed in estimating the weight of the oil transported, the weight of the package or barrel containing it was included.

Assume that this rate was a reasonable one—and it was so found by the Commission—and that in other respects it was unobjectionable.

While shipments of barrel oil were being made under this rate some shipper who has supplied himself with a tank car tenders this car loaded with oil for transportation to Perth Amboy, offering to pay 16½ cents per hundred pounds for the transportation of the oil. What is the duty of the railroad company under such circumstances?

It could, of course, take the position that the shipper must pay freight on the weight of the tank which enclosed the oil, but would this be fair or just to such shipper? Could he not properly reply that the Railroad Company

did not in the case of barrel oil include in the weight of the box, if we may call it such, of the box car, and consequently should not include in his weight the tank of the tank car, and could he not fairly contend that if he chose to ship his oil in bulk the weight of his oil should not be arbitrarily increased merely for the purpose of preventing him from deriving any advantage over the barrel shipper?

For the Court will not fail to observe that as the Commission found the rate on barrel oil reasonable it could not have objected had the carrier, in order to avoid what the Commission has found to have been a discrimination in favor of the tank shipper, so adjusted its charges on tank shipments as to make the tank shipper pay a greater rate per hundred pounds of oil, in order to prevent him from getting the same amount of oil transported for a less sum than the carrier was charging the barrel shipper. In other words, that under the theory of the Commission the carrier would have been justified in charging the tank shipper a rate which he would have paid had he shipped in small packages rather than in bulk, and thus a purely arbitrary charge would have been made against him, the sole purpose of which would have been to prevent him from deriving any benefit from the shipment of his oil in such a manner as to materially reduce the weight which the carrier was obliged to transport. How could such an arbitrary charge on the part of the carrier be sustained or supported?

The basis of all discrimination must be an inequality in the treatment by the carrier of shippers who because of the circumstances and conditions surrounding or affecting their shipments are entitled to equal treatment.

Why should not a shipper who designs and pays for an economical method of transportation, obtain the benefit of it? The argument against this is, that many shippers could not provide themselves with tank cars, and, if even they did so provide themselves, had no facilities at the end of the haul, for unloading and stor-

ing the oil from cars of this class of construction. We submit, that the test is not what happens or may happen in a particular case, but whether there is any preference given by the carrier to one class of shippers over another. To say that, because a particular shipper would not or could not avail himself of this cheaper mode of transportation, he was therefore entitled to the same rate as though he had used the better method, is to make the carrier pay the cost of the shippers' inability to lessen the burden of the load to be carried.

If a shipper, by intelligence and foresight or by the employment of capital, can economize the weight which the carrier is to transport for him, certainly there would seem to be great injustice in requiring the carrier to so adjust its charges as to deprive him of the benefit which his skill and capital would otherwise have procured for him.

The question, we submit, is not whether a hardship may fall upon particular shippers but whether they, by reason of lack of facilities or lack of capital are unable to obtain as good results as others better equipped.

It is evident that there is a loss to the carrier in hauling oil in barrels as against hauling in tank cars. The question presented is: "Where should this burden be placed?" The purchaser who ships by barrels says, in substance, that it must be upon the carrier, and that it must find the capital and procure the equipment of tank cars for all, or else haul none. On behalf of the carrier, we submit, that the loss by reason of hauling the heavier package is not one of its own creation, and that the loss thus produced must fall upon those who, whatever the reason may be, are unable to adopt the more economical form of transportation. The inequality is in the thing itself, and not in any regulation or action of the carrier.

The Commission's own findings warrant, and, indeed, force the conclusion that whether viewed from the standpoint of the carrier or from that of the shippers themselves, relatively lower rates on tank than on barrel shipments were fully warranted.

Yet in order to bring about what it regarded as an equality of charge as between the two classes of shippers the Commission would have the carriers ignore their own interests, carry barrel oil at less than reasonable rates and deprive the tank shipper of the lower rate which the conditions affecting his shipments entitled him to receive. And for what purpose? To endeavor to prevent what the Commission thought an undue preference accruing to tank shippers, as to the existence of what preference the Commission felt obliged to quote with approval the following language from one of its own decisions.

> "Whether the advantages which the tank shipper apparently enjoys are a mere incident of his business for which the carrier should not be held responsible, or whether these benefits result from discriminating usages adopted by the railroads and their failure to supply all customers with a special vehicle suited to the demands of a special traffic must be in any particular case, a most perplexing inquiry. To require the barrels in which this article is shipped to be carried without expense is contrary to the general and lawful custom which includes the package in the freight to be paid for, yet, in certain situations and under certain circumstances, there may be no other remedy for actual injustice, and no other effectual means by which the carrier can render equal and impartial service to every patron." Record, pages 101 and 102.

That the Commission had indeed found this "a most perplexing inquiry" will appear from the following extracts from some of their previous decisions:—

> "The rule should be to consider the tank a part of the car itself, and for the load carried in it the charge ought to be the same by the hundred pounds as is made on the transportation of barrels of oil in carload lots in other cars. Even then the shipper

in barrels is at some disadvantage, for he must pay freight on barrels as well as on oil; *but this, as between him and the carrier, is not unjust.*"

Rice *vs.* Louisville Co., 1 I. C. R., 722, 742, February, 1888.

"We hold that when transportation is in carload lots, the same charge by the hundred pounds should be made upon all consignments from and to the same point." (*Id.*)

"This ruling does not preclude such allowance for the use of tank cars as is customary, provided it be reasonable; but, on the contrary, it assumes that such allowance will be made." (*Id.*)

The order in that case was that the carrier cease and abstain

"from making any higher charges by the hundred pounds for the transportation of the oils in barrels, including the barrels, than it makes or shall make contemporaneously for the transportation of the like weight of the oil in tanks." (*Id.*, page 754.)

In Schofield *vs.* Lake Shore and Michigan Southern Co. (2 I. C. R., 67, 75, July, 1888), the Commission again ruled upon the subject:—

"There appears to be no law that prevents a carrier in the course of his business from arranging with the shippers to furnish cars for the shipment of his own goods at terms agreed upon between him and the carrier; but in every such transaction the carrier, at his peril, must see to it that neither directly nor relatively must a better rate be given to such shipper than to others engaged in the same business, and making shipments of the same kind of goods, who are dependent on the carriers for cars. From this it follows, as we decided in Rice's case, that this carrier must make the same rates on oil, whether shipped

in carload lots in tanks or in carload lots in barrels. *The carrier, of course, has the right to charge for the weight of the barrels as a part of the freight.*"

Then, in Rice *vs.* Western Co. (3 I. C. R., 162), the Commission held that under the special and peculiar circumstances of that case the carrier should transport the barrels free of charge. But in Rice *vs.* Cincinnati Co. (3 I. C. R., 851, April, 1892), it was held that this was not the general rule upon the subject, and would be applied only under exceptional circumstances.

Consider what was imposed upon the carriers by the order of the Commission. The barrel which the carriers were ordered to carry free of charge was worth in the oil region $1.30, and more at tide water, and was, therefore, an article of value.

It is true that the Commission found, as we think on insufficient evidence, that the shippers could not realize for the barrel at destination a sum equal to its cost. The practice, nevertheless, was to sell the barrel for what it would bring, and if the Commission, if it appeared that the price realized for the barrel would cover the original cost and the freight thereon, would have reached a contrary conclusion to that which it did (and we are justified in concluding that this would have been the case), the proposition cannot, we submit, be sustained that the carrier should be deprived of the freight on the barrel to which it otherwise would have been entitled merely because the shipper could not realize enough for it at tidewater to give him back his original investment in the barrel and the freight which he had paid thereon.

The Commission, it can safely, we think, be assumed, would not have made an order requiring carriers to transport free of charge empty barrels of this character, and it is not perceived why any different rule should prevail if the barrels instead of being empty were loaded with oil.

The Commission's order cannot be justified upon the

theory that the carriers were under obligation to furnish a receptacle for the oil, and that failing to furnish a tank car they had no right to charge for the weight of the receptacle which the shipper himself furnished. Even if the carrier was under obligation to furnish the tank car, which we of course deny, its failure to do this could only subject it to the damages which would result to shippers because of its failure to furnish the equipment which it was its duty to supply, and while this might make it liable in damages to shippers injured as the result of such failure, it did not justify any order on the part of the Commission which should undertake to deprive the carrier of the right to charge a reasonable rate for the carriage of the oil in the barrel package. In other words the Commission might, in view of the conclusion reached by it, have held the carriers liable for the damages sustained by shippers as the result of the failure to furnish tank cars, and these damages might have been measured by the payment made by these shippers on account of the weight of the barrel, but that is a totally different proposition from that which is involved in the present case, in which the question to be determined is, has the Commission a right to order a reduction of rates as a *quid pro quo* for the failure of a carrier to furnish proper equipment.

Before leaving this branch of the case reference should be made to the position taken by the Court of Appeals as to this question of the lawfulness of the charge for the barrel package.

That court under a misapprehension, as we think, of the effect of a decision of this court, held that they were debarred from considering the question of the lawfulness of the Commission's order requiring the carrier to desist from charging for the weight of the barrel because in their opinion this was a question properly for the consideration and determination of the jury, and had been fairly submitted to them by the trial judge, and that their verdict in favor of the plaintiff in error consequently established that by charging

for the barrel the carriers had unjustly discriminated against barrel shippers.

"Whether a given transportation charge," says the Court of Appeals, "is just and reasonable or unreasonable and excessive is peculiarly a question for a jury. In Texas & Pac. Railway *v.* Interstate Com. Com., 162 U. S., 197, 219, the court said:

> "'The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality, and as there is nothing in the act which defines what should be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact.'
>
> "We perceive no reason why the principle here enumerated should not be applicable to the terms 'unjust and unreasonable' as employed in the first section. Upon the facts disclosed in the record there may be room for a difference of opinion among intelligent men touching the justness and reasonableness of the alleged overcharges, and, were it not for error on other points, the question was properly left to the jury." (Record, page 331.)

In the first place, as we have already pointed out, the verdict of the jury cannot be accepted as tantamount to a finding on their part that the charge for the barrel did result in unreasonable discrimination and consequent prejudice to the plaintiff in error, for the learned trial Judge did not instruct them that this was the question to be determined in arriving at a decision on the question of discrimination, but submitted to them the broad question whether the rate on refined oil in barrels did subject the oil shipped in that way "to any undue or unreasonable prejudice or disadvantage *in any respect whatsoever*."

And in the second place the question involved in the present case is not one arising under Section 3 of the Interstate Commerce Act. If the carrier, by charging

for the weight of the barrel subjected barrel shippers to any prejudice or unjust disadvantage it was because they were thus forced to pay charges which were greater than they should have been by comparison with the charges made to tank shippers and Section 2 of the Act was thereby violated. The prohibition of the third section is directed against "any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic."

Now as Section 2 of the Act defines the extent of the carrier's duty in respect to equality of charges it would seem clear that one asserting any violation by a carrier of its duty to charge equal rates must show a violation of that Section. If the carrier's rates are not obnoxious to that Section they are not open to attack under Section 3.

It will hardly be contended, we suppose, that a carrier could be convicted of violating the duty enjoined upon it by the Interstate Commerce Act in respect to equality of rates unless it were established that an inequality existed in respect to like shipments made contemporaneously and under similar circumstances and conditions, and this because Section 2 of the Act has in effect declared that these conditions must be present before a carrier can be held to have violated the obligation of equality, and it would, therefore, appear necessarily to follow that in order to establish that any rate attacked was discriminatory it must be shown that another and a lower rate was charged by the carrier on shipments which were like in character, made at the same time and made under substantially similar circumstances and conditions to those on which the higher rate was charged.

It becomes then a question whether the practice of the carriers in charging for the weight of the barrel involved an inequality of rates forbidden by Section 2 of the Act.

It probably will not be contended that a like service is performed by a carrier under substantially similar

circumstances and conditions in the transportation of barrel and tank oil shipments.

Doubtless it will be contended that the dissimilarity as between these two classes of shipments resulted in the present instance from the failure of the carrier to comply with its duty, and that consequently the case should be treated as if the traffic and transportation was similar in all respects.

An answer to this would be that the act deals with actual and not constructive or theoretical similarity of traffic and circumstances, but apart from this, we submit, that inasmuch as the inequality of charge which the Commission found to exist was held to be unlawful solely because of the failure of the carrier to perform an obligation which the Commission had found rested upon it, viz: the furnishing of tank cars, the question in the present case whether the plaintiff in error had been discriminated against, was not, as the Circuit Court of Appeals held, a question of fact but was a question of law, the answer to which must depend upon the answer to the question whether the carrier was or was not obliged to furnish tank cars.

It is of course true, that in the opinion of this Court referred to by the Circuit Court of Appeals, the language was used which is relied upon as establishing the proposition that questions as to what are undue and unreasonable discriminations under Section 3 of the Act are questions of fact, but it by no means follows, we submit, that in every case questions of alleged violations of Section 3 are solely for the determination of a jury; and much less is this true as to a question of inequality of rates under Section 2.

In the case alluded to this court was considering whether an order made by the Interstate Commerce Commission should be enforced as a lawful order. It was not dealing with any question relating to the tribunal which was to determine the existence or non-existence of discrimination or prejudice, and while it did say that such questions were questions of fact, it is clear that what

was meant was that questions of discrimination under Section 3 of the Act were questions of fact because of the absence of any standard or rule established or laid down by the Interstate Commerce Act itself.

If the construction upon which the Circuit Court of Appeals acted in the present case should be given to the Interstate Commerce Act, consider what the consequences would be! Any shipper dissatisfied with some rate or some practice of the carrier would only have to commence an action alleging that it in some respect prejudiced him, and was consequently discriminatory, and there would thus be raised a question which would have to be submitted to the jury in order to determine whether in any respect whatsoever the rate or practice was discriminatory, and consequently forbidden by the Interstate Commerce Act. It requires but little consideration to see what results would follow any such construction of the act. The same and identical practice or rate might be found by one jury to be discriminatory, and might be sustained as lawful and proper by another jury, and thus endless confusion and uncertainty would be occasioned, whereas the very purpose of the Interstate Commerce Act was, as this court has repeatedly declared, to insure uniformity of charge and practice.

The true rule, we submit, is that upon which the Supreme Court of Pennsylvania acted in the case of Hoover *vs.* Pennsylvania Railroad Company, 156 Pa. State Reports, 220.

In that case an action had been brought to recover damages because of alleged discrimination practiced under an act of the State of Pennsylvania somewhat similar in its terms to the Interstate Commerce Act. It was not denied that the inequality in rates existed upon which the plaintiff rested his claim of discrimination, but it was contended on behalf of the Railroad Company that the circumstances and conditions affecting the movement of the traffic to which the rates applied were such as to relieve it from the charge of having violated the act, the act requiring that equality must exist in rates "for a like

service from the same place upon like conditions and under similar circumstances."

The trial court having held that the question whether the inequality of rate amounted to discrimination under the act was one of fact which would have to be passed upon by the jury, and having submitted this question to the jury it became necessary for the Supreme Court in its consideration of the case to determine and pass upon the correctness of this ruling, and the conclusion reached by the court was thus expressed by it:

> "Nor can we regard this question as a question of fact for the jury alone. The ascertainment of the actual facts of the case, of course is for them, but where these are established by undisputed testimony, or are presented by proper points which cover the facts in evidence, the resulting question is whether the facts established, or undisputed, or exhibited in properly drawn points, bring the case within the operation of the words or necessary meaning of the statute, and that, of course, is a question of law for the court. For the question then is one of interpretation. Do the words of the statute extend to, and embrace, the established facts of the case, or do they not? If they do not, the statute is not applicable, if they do, it is, and the court alone, as in all other similar cases, must determine that question. It is beyond the function of the jury."

The present case is a far stronger one than that which was before the Supreme Court of Pennsylvania, for in the present case the discrimination is claimed to result from the maintenance of charges which, we believe we are justified in saying, were admittedly fair to the barrel shipper if the carrier was not under an obligation to furnish him a tank car. The question, therefore, is peculiarly and solely one of law to be determined by the court and not by the jury.

Before leaving this branch of the case it may not be amiss to direct the court's attention to a fact which

demonstrates how unwise it would have been for the Companies whose lines were used for the transportation of oil to Perth Amboy to have expended the large amount necessary to equip themselves with tank cars apart entirely from the consideration that the shippers to that point did not want and could not use that class of car.

Before the order was made which forms the basis of this present action shipments of export oil by rail to Perth Amboy had ceased. The reason for this is disclosed by the following extract from the testimony of the Manager of the Penn Refining Company, the plaintiff in error:

> "Q. After 1893, did your firm ship any export oil by barrel?
> "A. I don't think we have.
> "Q. By tank cars?
> "A. Yes, sir.
> "Q. To what points?
> "A. New York Harbor points.
> "Q. To what points in New York Harbor?
> "A. Constable Hook.
> "Q. Then, we are to take it as a fact, are we not, that after 1893 your company made no shipments of export oil, either in barrels or tanks, to Perth Amboy?
> "A. Not to my knowledge.
> "Q. You know of none having been made?
> "A. No, sir.
> "Q. And in 1893, I understand you to say, the shipments of export oil by pipe line began by the independent refiners?
> "A. Yes, sir.
> "Q. And since that time has not practically all export oil been shipped by pipe line by refiners? I say practically all.
> "A. Practically all; yes, sir." (Record, 247.)

The temporary nature of the traffic and its inevitable transfer to pipe lines was of course known to the officers

of the carriers and even, therefore, if there had been shippers of oil to Perth Amboy who could have availed themselves of tank cars, the carriers, apart from any other consideration, were under no obligation to supply such cars in view of the fact that the railroad was but a temporary expedient for the transportation of export oil and was bound to give way to the pipe line as soon as constructed because of the far lower cost of transporting the oil in that way.

We have dealt with the carrier's obligation in respect to tank cars upon the supposition that the Commission was justified in finding that the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company had transported tank cars loaded with oil to Perth Amboy, and consequently must be considered as owners of such cars under the theory acted upon by the Commission.

In point of fact, however, it very clearly appears that the few tank cars which were transported over the through route to Perth Amboy were those belonging to the Independent Refiners themselves, and inasmuch as the use of these cars was, of course, restricted to the owners, the whole argument of the Commission is inapplicable to the conditions which prevailed on this through route to Perth Amboy, for how can it be claimed that the carriers whose lines made up this through route were guilty of withholding the tank cars which were transported over this route and which under the Commission's theory must be regarded as the property of the carriers, from the complainants before the Interstate Commerce Commission, when, in point of fact, the use of these cars was confined to the members of these associations because of the fact that they were their own property, and under the practice that prevailed were devoted exclusively to their business?

The third objection, to which we desire to call the court's attention is that **the order if complied with would have resulted in the carriage at the same time and under circumstances and conditions identical as to the**

service rendered, of shipments of barrel oil at different rates of freight, due to the fact that in the case of shipments which would have been made in tank cars, had these been available, the freight would have been based upon the weight of the oil alone, while in the case of shipments made by shippers who did not desire tank cars the weight of the barrel would have been included in ascertaining the weight upon which freight was charged.

That such would have been the effect of the order if complied with cannot be gainsaid. The carriers were enjoined to furnish to shippers desirous of shipping therein tank cars, and if unable to do so were restrained as to such shippers from charging for the weight of the barrel. And it would inevitably have resulted from this that in the case of a carrier such as the Western New York and Pennsylvania Railroad Company, which was unable to supply tank cars, it, as well as its connecting lines, would have been obliged to carry for one class of shippers in barrels, viz., those who could avail themselves of and were desirous of availing themselves of tank cars, at lower rates of freight than would have been charged at the same time to those shippers who shipped in barrels not because of their inability to secure tank cars but because the necessities of their business required the shipments to be so made.

In an effort to prevent what it assumed was some injustice to the barrel shippers, resulting from the charge made by the carriers for the weight of the barrel, the Commission undertook to put in force a system which would itself be violative of the very section of the Interstate Commerce Act which the order made purports to be safeguarding. Let us suppose that the carriers had obeyed the order of the Commission and had put in force the tariffs called for thereby. By so doing they would have held themselves out as prepared to carry, and we may assume, would have carried, in some cases, oil in barrels for shippers, for which the charge would have been based upon the net weight of the oil alone, and in others oil in barrels, for which the charge would have been based

upon the weight of the oil, plus the weight of the barrel. The service performed by the carriers in both of these cases would have been identically the same. How could the discrimination or difference in charges be justified? The Commission's theory, of course, was that the carrier would be justified in remitting any charge for the weight of the barrel in favor of those shippers desirous of shipping in tank cars, but prevented from doing so because of the inability of the carrier to furnish the same. In other words that the carrier's charges may vary as between shippers shipping under the same circumstances and conditions, so far as the service to be rendered by the carrier is concerned, because of conditions affecting the shippers alone. That the carriers have not the right to recognize conditions of this sort as affecting or controlling their charges has, however, been clearly established, we submit, by the decisions of this court.

Thus, in the case of Union Pacific Railway Company *vs.* Goodridge, 149 U. S., page 680, it was held that a railroad company was not justified in making a lower rate to one shipper than to another, in order to compensate the former for the greater cost of producing coal, entailed by the conditions prevailing at his mine.

In the case of Wight *vs.* United States, 167 U. S., page 512, this court was required to consider whether section 2 of the Interstate Commerce Act had been violated by an agent of a railroad company who had made an allowance to one of two shippers, in order to compensate him for the cost of drayage from the railroad to his works, which expense was not imposed upon the other shipper because of the fact that he had track connections with the railroad. The court held that the act of the agent was a violation of section 2 of the Act, because the service performed by the railroad company was precisely alike for each shipper.

In what essential principle would the present case have differed from those quoted if carriers had conformed to the order of the Commission and regulated their charges accordingly? Unquestionably, in the case of two ship-

ments of barrel oil, as to one of which a charge was made for the barrels and as to the other no such charge was made, the carrier would be performing precisely the same service for each shipper, just as was the case in the Wight case above quoted, and under these circumstances it would appear that it would have no more right to justify the free carriage of barrels for the one shipper as against the other, upon the ground that this was necessary to enable this shipper to meet the competition of shippers by tank, than were the carriers in the two cases quoted justified in making allowances, in the one case to enable the shipper to meet the competition of others more favorably located as to producing, and in the other to meet competition of another more favorably located as to delivery.

It is therefore submitted that not only was the order made by the Commission unlawful, in that its effect was to deprive the carriers affected thereby of the reasonable compensation to which they were entitled for the service performed in carrying the barrel, but it was further objectionable because it undertook to establish a system which would inevitably have brought about discrimination in charges as between shippers for services performed by the carriers under like circumstances and conditions.

We come now to the objections which have to do specially with the order of reparation. In order to justify the award in favor of the plaintiff in error, not only must the Commission have found that the carriers had been guilty of some violation of the Act, but it must also have found that the plaintiff in error sustained damages in consequence thereof to the amount for which reparation in its favor was decreed. Was there any evidence that any damages whatever had been thus sustained? It must always be borne in mind in this connection that the Commission itself had determined that the rates in force, and which had been paid by the plaintiff in error, were reasonable, and that the Commission's award, was based upon a violation of

the carrier's duty, which was thus defined in the order of the Commission, "that the action of the defendants in charging for the weight of barrels in shipments of refined oil in barrels * * * *works unjust discrimination against such oil in barrels in favor of the same commodity in tank cars, while said defendants refuse or neglect to furnish tank cars to complainants and other shippers for the purpose of loading and shipping oil therein.*" And the carriers were enjoined and required "to wholly cease and desist from charging or collecting any rate or sum for the transportation of barrel packages on shipments of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York Harbor points or to Boston and Boston points, *or on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York Harbor * * points as said shippers may direct.*"

Under the view of the carrier's obligations upon which the Commission acted they were authorized to charge for the weight of the barrel, if, on reasonable notice, tank cars were furnished to the shippers who desired them, and consequently the Commission declined to award reparation as against the Pennsylvania Railroad Company, a defendant in one of the proceedings before it, although it had charged for the weight of the barrel, because it was not satisfied that the tank cars owned by that Company had not been open to shippers generally.

It was clearly incumbent, therefore, upon a shipper who sought reparation because of a charge made against him for the weight of the barrel to show that he had given to the carriers reasonable notice of his desire to ship in tank cars, and that the carrier had failed to furnish the same. This the plaintiff in error wholly failed to show. *There is no finding of the Commission to the effect that any demand had been made for tank cars in which to ship the oil, covered by the award made, and no evidence was adduced, either before the Commission or upon the trial in the*

Circuit Court, to prove that any such notice had been given or demand made, but, on the contrary, the evidence is very clear that the oil was shipped in barrels, not because of an inability to secure tank cars, but because of the existence of conditions which made it necessary, from the shipper's standpoint, to make the shipments in that way.

The oil covered by the award had been shipped to Perth Amboy, to be there loaded into vessels for export, and had all been shipped between September 3d, 1888, and May 15th, 1894. During all that period no facilities whatever existed at Perth Amboy for the shipment of oil in tank vessels. This is established by the testimony of D. A. Walker, which was as follows:—

"Q. Where do you reside? A. In Newark, N. J.

"Q. What is your present business? A. I am a clerk in New York City.

"Q. In what company? A. The Lehigh Valley Railroad Company.

"Q. Did you hold any position with that company from the year 1888 to 1894, including both of these years?

"A. Yes, sir?

"Q. What was it? A. Freight Agent.

"Q. At what point? A. At Perth Amboy.

"Q. And what were your duties as freight agent at that time? I will ask you specially with reference to any business coming to that point. A. Well, I had entire charge in collecting the freights and seeing that the goods were delivered.

"Q. You had charge of the collecting freights and seeing that the goods were delivered? A. Yes, sir.

"Q. During the time that you have mentioned—that is, from 1888 to 1894, including the year 1894—what facilities, if any, existed at Perth Amboy for the handling of oil shipped in tank cars? A. Previous to 1894 they had no facilities at all. We handled the tanks on the track until they were ready to receive them.

"Q. Now, in what way was oil that was received in tank cars handled? A. Emptied into barrels.

"Q. It had to be barreled at Perth Amboy? A. Yes, sir." Record, p. 246.

This fact would of itself be persuasive evidence as to the reason why the export oil, shipped to Perth Amboy, was shipped in barrels and not in tanks.

But it is not necessary to rely upon the inference, strong though it is, that because of the lack of facilities at Perth Amboy for handling other than barreled oil, this method of shipment was a necessity, for the testimony of Mr. S. Y. Ramage, who was a member of the associations, the parties complainant before the Commission, puts this beyond peradventure. His testimony bearing upon this question will be found on pages 282 and 283 of the record, and is as follows:—

"Q. What kind of vessels were used in shipping oil from Perth Amboy? A. Sailing vessels.

"Q. No tank vessels? A. No, sir; not up to 1891.

"Q. And how about after 1891? A. Well, I can only give you from recollection that about 1893 they commenced to ship in bulk in vessels.

"Q. That was after the United Refiners' Export Oil Company had built the storage tanks? A. Yes, sir.

"Q. Up to that time the shipments from that point had been exclusively in barrels? A. Yes, sir.

"Q. You were familiar, as the result of your visits to Perth Amboy, with facilities existing there for the handling of export oil, were you not? A. I was.

"Q. Were there any facilities there except those controlled by the United Refiners' Export Oil Company? A. No; there were not.

"Q. And they were owned by that company? A. They were.

"Q. I think you have testified that you yourself made through shipments of oil in tank cars to Perth Amboy over the Western New York and Pennsyl-

vania and Lehigh Valley route. I don't mean in this present proceeding, but before? A. When did I so testify?

"Q. Did you not so testify in the hearing before the Commission in these cases? A. I don't think so. I would like to refresh my memory from the testimony.

"Q. Well, you had tank cars of your own? A. I had; yes, sir.

"Q. *And if you did not ship in tank cars to that point, it was because it was more convenient to ship by barrel, because of the facilities there, wasn't it?* A. *No; it was because at that time the trade was oil in barrels—because the demand in the trade was for barreled oil.*

"Q. *I am speaking of shipments to Perth Amboy.* A. *That is also what I am speaking of.*

"By JUDGE MEHARD:

"Q. You were a member of the Independent Oil Refiners' Association of Oil City, were you? A. Yes, sir.

"Q. *And in speaking of shipments to Perth Amboy, have you reference to your own shipments simply, or reference to shipments of your association?* A. *I had reference to my own shipments and also to the shipments of my fellow-members, because we had knowledge of each other's shipments.*"

If further confirmation were needed of the practice of the members of the two associations to ship in barrels, it can be found in the following extract from the petition filed in the proceeding against the Pennsylvania Railroad Company and the Western New York and the Pennsylvania Railroad Company:—

"That of the petroleum so shipped as aforesaid, some is shipped in tank cars in bulk and some is shipped in wooden barrels loaded on gondola, box, cattle, or other cars; that the shippers affiliated to the petitioners ship principally in wooden barrels,

and the shippers affiliated to the Standard Oil Trust ship principally in bulk in tank cars." (Record, page 24.)

It is thus clearly apparent why, for these shipments to Perth Amboy, no demand was made for tank cars, and why Mr. Ramage, who was himself the owner of tank cars, did not make use of them for such purpose. The case, therefore, is one in which, even conceding, for the sake of argument, that the Commission laid down a proper rule for the governance of the carriers, this rule, so far as the defendant in error is concerned, and, indeed, so far as all his fellow-members of the associations are concerned, was not transgressed to their injury, and hence the award made was wholly unjustified.

There is another, and it would seem equally conclusive, argument against the right of the plaintiff in error to any award of reparation in this case.

It is well settled that a shipper cannot recover from a carrier upon the ground of unlawful preference or discrimination, merely by showing the existence of a rate under which shipments might have been made which, if made, would have been carried at an advantageous or preferential rate as against him. He must show actual shipments made under this discriminating rate.

In the present case it affirmatively appears that during the period covered by the award, the only shippers to Perth Amboy were the members of the associations, complainants before the Commission.

This is shown by the testimony of Edward T. Johnson, who, between the years 1884 and 1894, had been the general freight agent of the Western New York and Pennsylvania Railroad, and whose testimony on this point will be found on page 239 of the record. After describing the route made up of the lines of the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company, Mr. Johnson testified as follows:—

"Q. Was that route for the shipment of oil to Perth Amboy availed of by any other shippers than the independent refiners? A. No, sir.

"Q. Whom do you mean by the independent refiners? Were they the same who were embraced as associates in the proceedings before the Commission in the case that we have referred to here? A. Yes, sir.

"Q. Do you know what facilities existed at Perth Amboy for the handling of oil at that point? A. Not in detail; no, sir.

"Q. Do you know who controlled the terminals there and to whom oil was consigned that shipped over the Lehigh Valley? A. Only as I understood from others; not by direct knowledge; that they were owned and controlled by an export company—I don't remember the name of it.

"(Counsel for the plaintiff object to the question and the answer of the witness, because the witness does not know, of his own knowledge, according to his statement.)

"Q. Can you state to whom oil was consigned that was shipped in that way? A. I can't say in all cases; no, sir.

"Q. Will you please state whether, as a general rule, shipments to Perth Amboy were made in barrels or tanks? A. In barrels.

"Q. Then, I understand that you have testified that all the oil shipped to Perth Amboy was shipped by the independent refiners, parties to the proceedings that were had before the Interstate Commerce Commission? A. Yes, sir.

"Q. That refers to tank as well as to barrel shipments? A. Yes, sir.

"THE COURT:—I understand that all of the shipments to this point were in barrels? A. There were a very few tank cars; but in general they were in barrels."

The fact is, as the record discloses, that this route to Perth Amboy was established at the instance and for

the benefit of the independent refiners, and that the terminals at Perth Amboy, through which the oil was handled, were, until about the year 1893 or 1894, under the control of and managed by the "United Refiners' Export Oil Company," which was entirely friendly to the independent refiners, and not, in any way allied with their competitor, the Standard Oil Company.

All tank car shipments, therefore, to Perth Amboy (and Mr. Johnson testified that they were very few in number, and Mr. Walker that there would not be one tank car to a hundred with barrels), were shipments made by members of the associations themselves, and such undue preference or advantage, therefore, as accrued to tank shippers over the route to Perth Amboy, accrued to members of the associations themselves.

Can it be that these associations or their members can be permitted to recover damages in respect to all their shipments because the company carried for them certain of their shipments on this alleged preferential basis?

How were they damaged because of the preference accorded to them by the railroad companies on certain of their shipments? A shipper cannot recover on all the rest of his shipments the amount of a rebate which he had himself secured on one.

The trial Judge therefore we submit should have affirmed the following points submitted upon behalf of the Lehigh Valley Railroad Company.

> "If the jury believe, and the evidence to this effect is uncontradicted, that the only shipments made in tank cars over the Lehigh Valley Railroad were those made by members of the association, of which the plaintiff was one, then such tank-car shipments did not constitute a discrimination against the plaintiff which would support or justify the award made by the Interstate Commerce Commission, and hence your verdict should be for the defendant, the Lehigh Valley Railroad Company."

"It affirmatively appears that in the ascertainment of the amount awarded to the plaintiff the Interstate Commerce Commission charged the defendants with the amount collected by them on account of the weight of the barrel on the shipments of oil covered by the award without any proof having been adduced or finding of fact made that such shipments were thus made in barrels because of the inability of the plaintiff to procure tank cars. The assessment thus made was erroneous, and the order for the payment of the amount awarded is therefore not a lawful order of the Commission, and the plaintiff cannot therefore recover in this proceeding."

The next and third objection to the reparation order is **that it imposes upon each company, party to the through line over which the shipments moved to Perth Amboy, liability for the entire overcharge on the through line.**

The existence of a through rate covering the transportation of the oil over the lines of the two companies, viz: The Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company, was of course admitted. The answer of the Lehigh Valley Railroad Company to the petition of the plaintiff in error praying for the enforcement of the Commission's order contains the following averment as to the character and scope of the arrangement or agreement between the two companies touching the establishment and maintenance of this through rate.

"That its line did, in conjunction with the lines of the other company or companies referred to therein, form a through line or route over which oil was shipped from the oil regions of Pennsylvania to Perth Amboy, but it denies that any common control, management, or arrangement existed between it and the said other company or companies in relation to the oil business, other than that which resulted from the establishment

of a through rate from the point of origin to destination, made up of the rate which each company respectively was willing to establish and charge for the service performed by it on its own lines, and an understanding as to the through movement, without breaking bulk of the car in which the oil was shipped.

"The through rate thus established was, for the convenience of all parties concerned, paid and received as a gross sum; but, save as above, it was in no sense a joint service or charge over the entire through line over which the shipments moved." Record, page 135.

This averment has not been denied nor have the facts set forth therein been impugned or contradicted by any testimony in the case, and in fact it may be regarded as conceded that the through rate to Perth Amboy was nothing more than an ordinary joint rate of the character which prevails all over the country.

The reasoning upon which the Commission reached the conclusion that both the Western New York and Pennsylvania Railroad Company and the Lehigh Valley Railroad Company were severally responsible for the entire overcharge is most unsatisfactory, and apparently should have led to a diametrically opposite conclusion to that upon which the Commission acted, especially as to the extent of the liability of the Lehigh Valley Railroad Company.

The Commission's views were thus expressed:

"The eighth section of the Act (*i. e.*, Interstate Commerce Act) specifies the degree of liability: 'That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured

thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.' The defendants are severally liable for damages resulting from any violations found in these cases in which they or either of them participated.

"It is true that to enforce required charges in published tariffs or rate sheets, the order should be directed against all the carriers which participate in the transportation between points affected by the rates; but where, as in these cases, the law specifically provides for the individual liability of any carrier concerned for the full amount of damages sustained through enforced payment of excessive transportation charges or other practices made unlawful by the statute, it is not necessary to have all the carriers over any particular route before the Commission to enable it to direct reparation for wrongs which have been inflicted upon shippers under any such charges or practices.

"The sums received by the defendants for the transportation of the barrel package containing oil over their respective roads or lines must, under the law, be held to be the full amounts paid for carrying the barrel package between the points of shipment and destination. *By what carrier over any of these lines the excessive charge was received, or how it was divided, cannot augment or diminish the several liability of the defendants for the whole damage.*

"The above quoted provision of the eighth section is broad enough to charge each of the defendants with liability for the full damage, if it participated in the traffic at all, regardless of whether any one of the defendants was 'the carrier receiving the frieght for transportation, initiating and controlling the method or mode of carriage and billing the freight

through to destination at the aggregate rates of compensation charged.' *We think, however, that such limitation should control in these cases, for the reason that the alternative action allowed by our order of November 14th, 1892, the furnishing of tank cars to shippers, must be taken by the carrier on whose road the shipment originates, and that such cars must, if provided at all, be supplied from equipment in its possession, or by it through arrangement with connecting carriers.*" (Record, pages 74 and 75).

Here is an express declaration on the part of the Commission that while, in its judgment, the provisions of the eighth section of the Interstate Commerce Act are broad enough in ordinary cases to hold all who participate in any through rate liable for the full amount of any overcharge exacted, yet in the present case there should be a limitation of this liability, for the very good reason, given by the Commission, that it would be unfair to charge a carrier other than the initial one anything more than the amount that it actually collected and received, because of its inability to take the alternative action allowed by the Commission's order. Yet, in the face of this, an order is made which imposes upon each of the carriers to the through line, terminal as well as initial, liability for the entire overcharge.

The Commission seemed to regard the eighth section of the Interstate Commerce Act as broadening or extending the common-law liability to shippers, of carriers, parties to a through line, for the acts or omissions of the other parties to such line, but a consideration of this section demonstrates, it is submitted, that such was not its purpose. It enacts that if the carrier "shall do, cause to be done, or permit to be done," any unlawful or forbidden act, "or shall omit to do" any act required to be done, "such common carrier shall be liable to the person or persons injured thereby for the full amount of damages *sustained in consequence of any such violation of the pro-*

visions of this Act." "*Such violations*" can only refer to the violations prohibited by the previous part of the section, and these all relate to acts or omissions over which the carrier had itself control. "Do, cause, or permit to be done" is the language of the Act. There is not a word in the section which justifies any other construction than that the carrier infringing the Act is liable only for damages resulting from its own acts or omissions.

Under the Commission's theory a shipper could recover from any company, party to a through rate, any sum paid by him in excess of a reasonable charge on a shipment under such through rate, even though the overcharge may have come about solely as the result of the action of one of the other parties to such through rate in naming an excessive charge for the carriage over its portion of the through route.

The Commission evidently considered that in so far as the Lehigh Valley Railroad Company was concerned its liability for the entire overcharge resulted from its participation in the joint rate under which the shipments moved. This is evident from the following extract from its report:

> "It may be urged as an objection to our construction of the statute in these cases, as affecting oil transportation generally over connecting lines, that while an intermediate or terminal carrier in a line may be in a position to furnish tank cars to its own shippers, it may while so doing, be unable to provide such cars for shipments over its road from points on the roads of connecting carriers having no tank cars, and that to compel it to carry the barrel package free in shipments received from carriers having no tank cars, would be unjust. But there would not be any force in such an objection. When connecting carriers make a through route and establish through rates which apply as single charges for the whole service, they hold out themselves as carriers over such route at such rates, and must be prepared to furnish suitable

> 'instrumentalities of shipment and carriage,' so that the transportation may be conducted without wrong or injustice to those who desire to use the through line."—Record, page 75.

The vice of this contention is that it fails to recognize that each carrier whose line constitutes a through line over which a joint rate may be established makes the rate only over its own line, and that the through rate consists of the sum of these rates. The Lehigh Valley Railroad Company, for instance, did not and could not undertake to make a rate from some point on the Western New York and Pennsylvania Railroad to Perth Amboy, and the same is true as to the Western New York and Pennsylvania Railroad Company. That neither of these two companies made the through rate is clear. That in one sense they joined in making it is true, but it is equally true that such action did not impose upon them liability for each other's acts, even in respect to the transportation of traffic shipped under the through rate, much less in respect to duties or obligations of each other not connected with such transportation.

In Insurance Co. *vs.* Railroad Co., 104 U. S., 146, it appeared that certain railroad companies had entered into an arrangement for a continuous line between St. Louis and New York, which arrangement involved the making of a through rate and its division in certain agreed proportions, and this court had to pass upon and determine the liability of a company owning part of this through line for loss of goods occurring on another part of the through line. Mr. Justice Harlan, in delivering the opinion of the court, thus deals with the question of the effect upon the liability of the parties thereto of the arrangement for a through rate:—

> "Such an arrangement," said the learned judge, "did not, in our opinion, involve joint liability upon the part of the railroad companies, or make them partners either *inter sese* or as to third persons. Each company bore the general expenses

of its own route and of all transportation over it. The division, upon the basis merely of distance, of the aggregate pay for the entire route covered by the roads of these companies, gave each one no greater amount than perhaps it would have earned had the dispatch company contracted with each separately for the transportation of the cotton. The arrangement in question was one simply of convenience both for the shipper and the carrier. * * * The defendant received compensation only for transportation over its road and settled separately with the dispatch company. It undertook, and was only bound, to transport over its own line and deliver to the succeeding carrier. That duty was discharged and the loss occurred while the cotton was held by another carrier. The mere fact that it joined with other companies in establishing a through rate from St. Louis to New York, to be divided between themselves upon the basis, not of expenses incurred nor investment made, but of distance simply, although competent as evidence, does not, of itself, imply an undertaking to transport beyond its own line or to become bound for any default or negligence of other carriers."

If carriers parties to joint through rates do not, because of this fact, become responsible, and this Court has said they do not, for the default or negligence of the other companies parties to such rate in respect to the transportation of the traffic moving under such joint rate, upon what possible theory can it be claimed that they become responsible for any overcharge made by such connecting carrier or for the failure or refusal of such carrier to furnish equipment of the character desired by a shipper? The argument in support of the position that a carrier is responsible for the safe carriage over the entire route of any shipment made under a joint rate and through route to which it is a party is far stronger than any

argument which can be made in support of the proposition that a responsibility is assumed by a party to a joint rate for overcharges made by any other company also a party thereto or for the failure of such company to furnish cars.

The following point, submitted upon the trial upon behalf of the Lehigh Valley Railroad Company, should therefore, we submit, have been affirmed as embodying a correct statement of the rule applicable to the subject with which it dealt.

> "The Lehigh Valley Railroad Company, by joining with the Western New York and Pennsylvania Railroad Company in the establishment of a through rate from the point of origin of the oil to Perth Amboy, did not make itself liable to any one injured because of the unlawfulness of such through rates, except to the extent to which its participation in the same contributed to such injury, and as the award of the Interstate Commerce Commission against the Lehigh Valley Railroad Company, upon which this action is founded, went beyond this and charged the Lehigh Valley Railroad Company with the alleged overcharge made by both companies to the through line, the award was not a lawful one, and your verdict should therefore, be for the defendant, the Lehigh Valley Railroad Company."

And if this be a correct statement of the law applicable to the Lehigh Valley Railroad Company the proposition is equally true when applied to the Western New York & Pennsylvania Railroad Company.

The Circuit Court of Appeals did not pass upon the three objections to the order of reparation with which we have just been dealing, and we have not, therefore, had the benefit of their opinion on the points of law involved therein.

Their action in reversing the judgment of the Court below was rested upon their conclusion that the repara-

tion order was invalid because of the consideration to which we are about to allude, and because of other objections which, however, they did not particularize, and which in their opinion, they say they did not deem it necessary to discuss.

The next objection to the reparation order has to do with the question of the liability of the Lehigh Valley Railroad Company for alleged overcharges between February 11th, 1892, and August 1st, 1893, a portion of the time covered by the award, during which period the railroad and property of the Lehigh Valley Railroad Company was in the possession of and operated by the Philadelphia and Reading Railroad Company as lessee.

The Commission held that, notwithstanding this fact, the Lehigh Valley Railroad Company was liable for overcharges collected by its lessee, upon the ground, to quote its exact language, that "the Lehigh Valley Railroad Company, a common carrier, subject to the provisions of the Act to Regulate Commerce, could not, by leasing its road, free itself from liabilities for practices made illegal by that statute, nor, after resuming operation of its property, pending proceedings against it to enforce statutory provisions so violated, and to recover damages for injuries sustained under such violations, can it claim exemption from liability during the term of the lease."

The learned trial Judge of the court below apparently was not prepared to indorse the broad view taken by the Commission, but charged the jury as follows: "In view of the fact that under the lease in question, the Lehigh Valley Railroad Company was to be paid by the Reading Company a percentage on the gross earnings of the road during the lease, we are of the opinion that the Lehigh Valley Railroad Company was not exempt from liability during the lease, if it was chargeable in other respects, and the plaintiff is entitled to recover against it in other respects."

In the first place, it may be said of the above direction that it was an error to state that the lease provided for a payment to the Lehigh Valley Railroad Company, by its lessee, the Philadelphia and Reading Railroad Company, of a "percentage on the gross earnings of the road." The lease will be found set out, commencing at page 253 of the record, and the covenants as to the rental will be found on pages 255 to 257, inclusive. From these it appears that the payments to be made were not based upon nor did they consist of any percentage or proportion of the gross receipts derived from the operation of the property, but were fixed sums equal to the interest on the obligations of the lessor, and a certain dividend on its stock.

Probably what the learned judge had in mind is the last paragraph of the lease which provided that commencing the first day of January, 1894, and annually thereafter, the lessor should be entitled to receive an additional sum over and above the interest and dividends, equal to fifty per cent. of the surplus net earnings, as defined in the lease; but this provision, if it could have any legal effect whatever upon the question involved herein, could have no application to the period of the lease which antedated January 1st, 1894; and the award covered the period between September 3d, 1888, and May 15th, 1894. So that, in any aspect of the case, the direction to the jury was based upon a misconception of the facts, and was erroneous.

Before passing to the consideration of the liability of the Lehigh Valley Railroad Company for the acts of its lessee, upon the broad ground upon which the Commission put it, it is necessary to consider, however, the concluding paragraph of the portion of the charge of the learned judge which is embraced in the twelfth assignment of error. After charging the jury as above set out, he continued: "In view, however, of the admission of counsel for plaintiff that they have shown no shipments during said period, and claim no reparation for such, it will be apparent to you that the question as to the giving of this lease need not concern the jury, and so I instruct you."

It is submitted that this was giving a totally unwarranted effect to an admission by counsel. An admission against interest may be made by counsel, but to say that counsel can get rid of a difficulty in a case arising from an alleged condition by stipulating or admitting that this condition does not exist, is, to say the least, a novel proposition. The award of reparation, upon which the action was founded, states that the shipments, on account of which it was made, were those "transported over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad between the third day of September, 1888, and the fifteenth day of May, 1894." If, in point of fact, there was any question as to these shipments having ceased prior to the date of the lease, February 11th 1892, this question at the best should have been submitted to the jury. An instruction to the jury that they should totally disregard the question, because counsel for the plaintiff conceded that they were making no claim for shipments made during the lease, was not the way to dispose of the matter.

The Commission in reaching its conclusion relied upon the case of Railroad *vs.* Brown, 17 Wallace, 445. That was an action brought by a passenger to recover damages for an alleged unlawful expulsion from a train of the Washington, Alexandria and Georgetown Railroad Company. It appeared that this railroad was located partly in the State of Virginia and partly in the District of Columbia. The portion of the road in the State of Virginia had been leased to individuals, while the portion in the District of Columbia was in charge of Receivers. *It nowhere appears in the case that any statutory authority existed for the lease to these individuals.* The ticket issued and held by the plaintiff at the time of her ejection had been issued in the name of the railroad company. This Court sustained a recovery against the railroad company, upon two grounds: first, that they were liable for the acts of the servants of the lessees; and, second, that the ticket issued amounted to a contract for car-

riage with the company, and not with the lessees and Receivers. The case was one which comes within the well-settled line of decisions that a railroad company cannot, by a lease not authorized by statute, relieve itself from liability imposed by its charter, and consequently must continue liable for the acts of its lessee. This is a different proposition entirely from the one that is presented in the case of an attempt to hold a lessor liable for acts of its lessee, where the lease has been executed pursuant to statutory authority.

In Arrowsmith *vs.* Nashville & Decatur R. R. Co. *et al.* (Circuit Court, N. D. Tennessee), 57 Federal Reporter, 165, the law upon the subject of the liability of the lessor for damages done or caused by the lessee of a railroad is fully dealt with in a case where the liability of a lessor for injuries to a passenger on the road was sought to be established upon the ground that the duty to carry safely was an obligation imposed by the charter of the lessor from which it could not escape, even if its road was at the time being operated by a lessee under a lease sanctioned by law, but which contained no express release from liability of the lessor.

In the opinion delivered in this case by Circuit Judge Lurton, the various cases, some of which are quoted in the opinion of the Commission as supporting the doctrine that the Lehigh Valley Railroad Company could be held for the overcharge collected during the period of the operation of the road by its lessee, are reviewed at length and are shown to have been decided on grounds which in nowise conflict with the view reached by the learned judge in the case in question. In concluding his opinion, Judge Lurton thus summarizes the law upon the subject:—

> "Where obligations are imposed by charter or statute law upon a railroad company for the protection and advantage of the general public not having contract relation with it, it may very well be said that a general authority to lease out its road, which contains no provision exempting it

from such public obligations, will not absolve it from liability. So, if a railway be in such condition that it is a nuisance when leased out by reason of the absence of something necessary to its safe operation, or the presence of something dangerous to its safe operation, and this nuisance be continued by the lessee, both the lessor and lessee would be liable—the one as having created, and the other as having continued, a nuisance. But to say that, after the lessor has by authority of law transferred the control and management of its road to another, he shall, unless specially exempted, remain liable for all the torts and contracts of the lessee, is to ignore the contract of lease and the legislative sanction under which it was made. The State, on the grounds of public policy, may well refuse its consent to the transfer; but, if it consent, then there is no public policy to authorize the courts to say that the responsibility for the future management and operation of the road has not been exclusively imposed upon the lessee as the lawful substitute for the company owning the road. * * *

These principles seem to have the support of the most satisfactory authorities. Mr. Wood thus sums up the rule, as deduced by him from the cases:—

"'But where the statute authorizes the lease, the lessee assumes, during the existence of the lease, all the duties and obligations of the lessor, and from the time that it enters into possession of the road becomes solely liable for all injuries resulting from its management, unless it is operating the road in the name of the lessor.' Wood, Railway Law, section 490.

"This principle has the express sanction of the Court of Appeals of the State of New York in two well-reasoned cases: Ditchett *vs.* Railroad Co., 67 N. Y., 423; Miller *vs.* Railroad Co., 125 N. Y., 118, 26 N. E. Rep., 35. The distinction between public

duties imposed by law and the right of one injured through the negligence of the lessee is recognized by the courts of Maine. Mahoney *vs.* Railroad Co., 63 Me., 69. In Nugent *vs.* Railroad Co., 80 Me., 62, 12 Atl. Rep., 797, the court fully discussed this distinction, saying:—

"'And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation of and handling of its trains and the general management of the leased road, over which the lessor could have no control. But from an injury received from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, &c., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility. Railroad Co. *vs.* Curl, 28 Kan., 622, 11 Amer. & Eng. R. Cas., 458.'

"The distinction was pointed out clearly by Judge Brewer in Railroad Co. *vs.* Curl, 28 Kan., 622. To the same effect is Briscoe *vs.* Railway Co., 40 Fed. Rep., 274. See, also, Railway Co. *vs.* Washington (Va.), 10 S. E. Rep., 927, 43 Amer. & Eng. R. Cas., 688."

The above opinion of Judge Lurton was approved and adopted by the Circuit Court of Appeals of the Seventh Circuit in the case of Hayes *vs.* Northern Pac. R. R. Co., 20 C. C. A. Rep., 52 (74 Fed. Rep., 279), where the subject is further discussed.

In Elliott on the Law of Railroads, page 605 *et seq.*, the reasons for the exemption of the lessor are so strongly and convincingly put that we may be pardoned for quoting them *in extenso*:—

"When power to execute a lease is conferred upon a corporation the legislature must, in the absence of countervailing language, be deemed to intend to

authorize the execution of such an instrument as the established law regards as a lease. The law enters as a silent factor into every contract, and hence of every lease it is an important element. The legal effect of a lease is to transfer for a prescribed period of time the possession and control of the property of the lessor. In authorizing the execution of a lease the legislature grants the right to execute and carry into effect such an instrument as divests the lessor of possession and control and places it in the lessee to the exclusion of the lessor. The possession of the one party is excluded and that of the other is made complete by the legislative sanction. If a sale is made under valid legislative authority the company that acquires the property acquires an exclusive right and interest, and the lessee, by virtue of the lease, acquires a similar right so far as possession, control, and management are concerned, for the term for which the property was leased. It cannot be doubted that a statute conferring general authority to sell means a complete and effective sale, and upon the same principle it must be concluded that the power to lease, unless qualified and limited by statute, is a power to make a complete and effective lease. A complete and effective lease certainly vests the right of possession, control, and management in the lessee, since no other effect can be assigned such a lease without a direct and palpable violation of long and well-established principles of law. The lessor company does no wrong in executing a lease which the law of the land gives it full power to execute, so that in executing the lease there is no improper motive, no illegal act, nor any wrongful attempt to escape a duty. In granting authority to lease, the legislature empowers the lessor company to transfer the duty of operating the road to the lessee, and in doing what the legislature authorizes no rule of public policy is violated. It is, indeed, inconceivable that there can be a violation of a rule of public

policy where the act done by a party is done under a legislative enactment and in accordance with its provisions. The cases which hold the lessor liable, although the lease is an authorized one, upon the ground that there must be an express exemption from liability in order to exonerate the lessor, concede what could not be denied without leaving the domain of reason, that the legislature may by express enactment exonerate the lessor, so that, even upon that theory (which we believe to be unsound) the question, at bottom, is one of statutory construction. The courts which assert the theory mentioned tacitly assume that in granting authority to lease the legislature granted something less than an authority to lease. We believe that the only theory that can be defended on principle is that in granting authority to execute a lease the legislature conferred authority to execute an effective instrument with all the qualities and incidents with which the law invests a lease. If this be true, then the lease does transfer possession and control from the one party to the other for the term of the lease, and the rights and obligations of the parties are such, and such only, as the law annexes to the relation of lessor and lessee."

We have thus dealt at greater length than we perhaps should have done with the matters which affect the validity of the orders made by the Commission. We shall as briefly as possible refer to certain errors which we submit were committed by the Circuit Court in the trial of the case in respect to the admission of testimony.

To establish its case in the Circuit Court, the plaintiff in error introduced voluminous extracts from the opinion and the report of the Commission, and the orders made thereon, which were all admitted in evidence against the objections of the defendants. Practically the entire opinion and report of the Commission were admitted upon the theory that they constituted "findings of fact" by the Commission, and as such were ad-

missible under the provision of the Interstate Commerce Act.

The jury were informed and instructed that these were admitted under the provisions of the Act which made them *prima facie* evidence. Hence, they must have naturally inferred that everything thus admitted and read to them contained in the report and findings of the Commission was to be regarded as conclusive by them, unless controverted by the defendant. The learned judge instructed them on this point as follows (Record, page 165):—

> "We have allowed findings of fact by the Commission; wherever they have found facts, we have allowed those facts to be given in evidence before you, and those findings of fact are to be considered by you. They are *prima facie* evidence of the matters therein stated, for the Act of Congress provides that 'at the trial the findings of fact of said Commission shall be *prima facie* evidence of the matters therein set forth.' By this term '*prima facie*' is meant generally that you are to accept the findings as evidence of the matters therein stated in the absence of proof to the contrary."

Now, one of the so-called findings of fact by the Commission, thus admitted in evidence, was the following (Record, page 222):—

> "After full investigation and mature consideration we hold that where both modes of transportation are employed by the carrier, and the use of one, the tank car, is not open to shippers impartially, but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels of like quantities of oil between like points of shipment and destination, than to tank shippers, is an unjust discrimination,

subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers."

Under the conditions, under which this conclusion of the Commission was admitted, what could the jury have inferred other than that the question whether defendants had discriminated against the barrel shipper, was a question of fact as to which the finding of the Commission that the defendants' practices did amount to such a discrimination, was to be given the effect, accorded by the Act, to findings of fact. In effect, the jury must have understood that the determination by the Commission of the very question involved in the proceeding, which was not one of fact, but one of law, must be accepted by them as *prima facie* correct, and thus the whole burden of the case was shifted from the plaintiffs, where it properly belonged, to the defendants.

As examples of arguments in support of legal conclusions reached, which, in no respect, embodied any findings of fact, the court's attention is respectfully asked to the extracts from the Commission's report, which will be found on pages 182 and 184 of the Record.

The difficulty that the learned counsel for the plaintiff in error labored under was that it was impossible, due to the failure of the Commission to embody in its report any findings of fact, to avoid offering a great deal of the report, which we submit was not in any aspect of the case admissible, in order to get some connected statement before the jury. But if the Commission had failed to make any findings of fact, which can be regarded as conforming to what the law had in contemplation, this is no justification for allowing the whole report practically to be given in evidence in order that the jury may glean therefrom, under the guidance of counsel, the facts which were supposed to be sufficient to establish the right of recovery.

When Congress declared that the Commission's findings of fact should be treated as *prima facie* evidence of the facts stated therein, it undoubtedly had in mind express and clear findings of fact as distinguished from a general opinion or report covering the entire case.

In the case of Interstate Commerce Commission against Louisville & Nashville Railway Company, 73 Federal Reporter, page 409 (Circuit Court, Middle District, Tennessee), Judge Clark, in treating of the procedure before the Commission, and of the duty incumbent upon it to make its report conform to what was evidently contemplated by Congress, said:—

> "Congress having provided for such investigation and report in general terms only, it is not to be doubted that substantial conformity to a judicial proceeding was contemplated. And the importance of the Commission's action, taking substantially the form of a judicial proceeding, is apparent when it is recognized that the Commission is composed of men of ability and experience, selected for this position with reference to their particular qualifications therefor, and whose entire time is devoted to questions arising under this Act. This gives to the Commission's finding and opinion great weight, and entitles it to great consideration, both by the parties affected and by the courts, when called upon to enforce obedience to its mandates. For the Commission's investigation and opinion to have this intended value, however, it should, in fact, conform to the purpose of Congress in requiring such proceedings. It is not sufficient, therefore, in a report of its findings of fact and conclusions, to do so in such general way as not to disclose its views upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in the case. Stated in another form, it is not sufficient for the report to be made up of mere conclusions. Its opinion or report should show what the issues in the case are, and what facts it finds in regard to such

issues. The report should make suitable reference to the evidence adduced in regard to any particular question, where there is a conflict in the proof, showing how the Commission settled the disputed fact; or, if the evidence in regard to any issue is undisputed, state that fact. In other words, the report should give the parties to be affected, as well as the court, in any judicial proceeding afterwards instituted, definite and distinct information as to what was found as facts, and the Commission's opinion thereon, such as would be necessary to make a judicial opinion sufficient and satisfactory for the purpose of ordinary litigation."

Many other instances could be pointed out of admissions of extracts from the Commission's opinion and Report fully as objectionable as those above indicated.

We should not be justified, however, in referring at length to these, but we do desire to direct the courts' attention to the admission in evidence of the so-called "Order of reparation." This order was as follows:—

"The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant the Western New York and Pennsylvania Railroad Company and Samuel G. DeCoursey, the Receiver thereof, and the defendant the Lehigh Valley Railroad Company the sum of $8570 as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York and Pennsylvania Railroad Company or to its said Receiver for transportation over the Western New York and Pennsylvania Railroad and the Lehigh Valley Railroad Company from Oil City, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the third day of September, 1888, and the fifteenth

day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said Receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. DeCoursey, the Receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of $8579, together with interest thereon at the rate of six per cent. per annum from May 15th, 1894."

When this order of reparation was first offered in evidence the trial judge reserved his decision as to its admissibility, but later on admitted it as a finding of fact. His ruling to this effect will be found on page 287 of the record.

It is only the *findings of fact* and not the *recommendations as to reparation* that are made evidence by the Interstate Commerce Act. The recommendations as to reparation are necessarily excluded as evidence by the words of the fourteenth section, which reads as follows:—

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the *findings of fact* upon which the *conclusions* of the Commission are based, together with its *recommendation as to what reparation*, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such *findings* so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to *each and every fact* found."

This section contemplates that in each case a report shall be made by the Commission, and that it shall include the findings of fact upon which the conclusions of the Commission are based, and it may also include, in

cases which require it, the recommendation of the Commission as to what reparation should be made to an injured party. But it is only the findings of fact that are made evidence, and not the conclusions or the recommendations.

The rules of the Commission in force at the time its order was made sustain the proposition that findings of fact must embrace only conclusions as to the facts established before it, for one of its rules read as follows:

> "Upon the final submission of the case to the Commission, either party may submit proposed findings of fact for the consideration of the Commission, which findings must embrace only the material facts of the case supposed to be established by the testimony."

It may be safely assumed that if the plaintiff in error had, pursuant to this rule, submitted as proposed findings of fact, the various extracts from the Commission's opinion and report which the trial judge permitted to be given in evidence they would have been rejected by the Commission as not complying with either the requirements of the Interstate Commerce Act or the rules promulgated by the Commission itself.

If an order of reparation can be given in evidence as a finding of fact then it inevitably follows that a party who has secured an award can in the proceeding brought to enforce it establish a *prima facie* case by offering it in evidence. This would undoubtedly tend to simplify and shorten proceedings in the Circuit Court, but it is not believed that such a practice would conform to legal requirements.

The Circuit Court of Appeals sustained the objection to the admission of the so-called findings of fact including the order for reparation, holding that these were improperly admitted, because in their opinion the Interstate Commerce Act "does not make the mere legal opinions, arguments or reasons of the Commission *prima*

facie evidence or evidence of any kind in any judicial proceeding." (Record, foot of page 311.)

There was undoubtedly, therefore, we submit, a mistrial in the Circuit Court because of the erroneous admission in evidence of the Commission's conclusions and arguments. But for the reasons which we have above endeavored to sustain we submit that the judgment of the Circuit Court of Appeals should be affirmed not because of error committed upon the trial by the Circuit Court, but because the orders of the Commission upon which this proceeding rests have not been shown to have been lawful orders, but, on the contrary, have been, as we contend and believe, shown to have been founded upon a misconception of the obligations of the carriers affected thereby, not merely to shippers generally, but to the particular shippers in whose favor the awards embraced in the reparation order were made.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Lehigh Valley R. R. Co.

PENN REFINING COMPANY, LIMITED, *v.* WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 27. Argued October 18, 21, 1907.—Decided January 27, 1908.

An order of the Interstate Commerce Commission, that carriers not charging for tanks on tank-oil shipments desist from charging for the barrel on barrel shipments, or else furnish tank cars to all shippers applying therefor, *held*, in this case, to be equivalent to a holding that the charge for the barrel, is not in itself excessive, and therefore, also *held*, that barrel-oil shippers who had not demanded tank cars had not been discriminated against, and were not entitled to reparation for the amounts paid by them on the barrels.

It is the duty of a connecting carrier on a joint through rate to accept the cars delivered to it by the initial carrier, and it is not thereby rendered liable for any wrongful discrimination of the initial carrier merely because of the adoption of a joint through rate, which in itself is reasonable; nor is such connecting carrier rendered liable for any such wrongful act of the initial carrier by section eight of the Interstate Commerce Act.

137 Fed. Rep. 343, affirmed.

THE plaintiff in error, who was plaintiff below, seeks to review a judgment of the Circuit Court of Appeals for the Third Circuit, 137 Fed. Rep. 343, reversing absolutely and without allowing a writ of "*venire facias de novo*," the judgment of the Circuit Court of the United States for the Western District

of Pennsylvania in favor of the plaintiff company for $8,579, with interest from May 15, 1894; in all, $12,706.92. This sum was made up of the charge of fourteen cents for the weight of the barrel in which oil was transported to Perth Amboy from the Pennsylvania oil fields, from September 3, 1888, the time when such charge commenced, to May 15, 1894, the time when the hearing on the claims was had before the Interstate Commerce Commission.

The proceeding resulting in the petition herein to the Circuit Court was originally commenced before the Interstate Commerce Commission, and thereafter conducted pursuant to §§ 13–16 of the act creating the Commission, February 4, 1887, c. 104, 24 Stat. 379, 384, as amended by the act of March 2, 1889, c. 382, 25 Stat. 855, 859; 3 Comp. Stat. 3165, to obtain relief from certain alleged illegal practices of the railroad companies in the way of overcharges for the transportation of oil for the complainants in the petition, and to obtain reparation therefor.

Three substantially contemporaneous yet also separate petitions were filed with the Commission, two on the fourth of December, 1888, and one on the thirtieth of January, 1889, by the Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, against several railroad companies.

The petitioners were associations of some sixteen separate refining companies, operating distinct and separate works in the oil regions of Pennsylvania, near the city of Titusville or Oil City.

The petitions were filed for the purpose of obtaining relief from certain charges made by the defendant companies against the petitioners for the transportation of their oil from those oil fields to tidewater in New Jersey, and specially to Perth Amboy in that State, and described as a point in New York harbor, and also to Boston and points in that vicinity. Their petition relating to the charges for transportation to Perth Amboy is alone involved here.

The ground of complaint in that petition was that the railroads who were therein made defendants, viz., the Western New York and Pennsylvania, and the Lehigh Valley, charged sixty-six cents per barrel of oil, which was alleged to be an excessive, unjust and unreasonably high rate for the transportation of oil to Perth Amboy.

There was no complaint in the petition of the failure of defendants to furnish tank cars for the petitioners for the transportation of their oil to Perth Amboy. There was no averment of unfairness of the rates as between barrel and tank oil. Nor was there any averment that the defendants, by their custom of charging for the gross weight of the oil and barrels, were giving a preferential rate to the tank shippers as against the barrel shipments made by plaintiffs. It was only alleged that the rate for the transportation of oil to Perth Amboy was unreasonably high at sixty-six cents per barrel, the weight of the barrel being included and charged for therein. The averments in the petition, that plaintiffs were subjected to undue prejudice and that an undue advantage was given their competitors in business, among others the Standard Oil Trust, had no relation to discrimination arising from a charge for the weight of the barrel, but was connected with the averment that the charge of sixty-six cents for the carriage of the oil was excessive, and hence worked a disadvantage to the plaintiffs and gave an unreasonable preference to the competitors in plaintiffs' business.

The prayer of the petition was that the Commission direct the defendants to cease their unlawful acts, etc.

The evidence was taken before the Commission in the three cases, with the understanding it should be applied to each or all the cases, so far as applicable therein.

It appears by the evidence before the Commission that the charge of fourteen cents per barrel (in addition to fifty-two cents for its contents) for the transportation thereof to Perth Amboy commenced about September, 1888, and prior to that the charge had been fifty-two cents for the oil and the barrel.

There had been some reasons alleged on account of which the charge had been limited to the total of fifty-two cents before September, 1888. Perth Amboy was the station to which all the petitioners in the proceedings before the Commission, applicable to that port, had consigned their oil for export, and that station had no conveniences for unloading in bulk the oil which was brought there in tank cars. Not one car in a hundred was a tank car. The trade demand at that point was for oil in barrels, and the ocean shipments therefrom by the petitioners were also made in barrels, as there were no vessels from that port carrying oil in bulk. Some of the petitioners in the proceedings before the Commission owned tank cars, but did not use them for the Perth Amboy port for the above reasons. Oil which came to Perth Amboy, intended for export, if it arrived in tank cars, had to be there unloaded and filled in barrels before it could be loaded on ships. The petitioners, including the plaintiffs, therefore, had no use for tank cars to that point. The Lehigh Valley Road did not own tank cars, nor did any of the other railroad companies to any material extent, except the Pennsylvania Railroad, which is not a party to this proceeding. The charges for transportation of oil in tank cars did not include any charge except for the oil. In the transportation of the oil to Perth Amboy *via* Buffalo, the initial carrier was the Western New York and Pennsylvania Railroad Company, the Lehigh Valley Railroad Company taking the oil as delivered to them in barrels in cars at Buffalo, New York, and transporting it to Perth Amboy, the plaintiffs paying therefor a joint through rate, amounting to sixty-six cents per barrel, including the barrel. The defendants had established this joint through rate. The tank cars that were used by others for transportation to other places than Perth Amboy were rented from the owners, who were also shippers of the oil, to the railroad companies, who paid the owners for the use of such tank cars a certain sum, determined by the miles run. Those cars were used exclusively for the transportation of the oil of the owners of the cars.

The Commission ordered the defendants to cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of western Pennsylvania to New York and New York harbor points, or, on reasonable notice, promptly furnish tank cars to complainants and others who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor points as the shipper may direct; and that said defendants notify the public accordingly by publication in their tariff of rates and charges, pursuant to the provisions of § 6 of the act to regulate commerce. It was also ordered that the rate on shipments of oil, both in tanks and in barrels, over said roads should be the same, and the said rate from said oil regions to New York points should not exceed sixteen and one-half cents per hundred pounds. The defendants were also required "to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package, on shipments of oil in barrels, *when the use of tank cars had not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use.*"

In its opinion, covering, so far as applicable, the three cases, the Commission said that the unlawful discrimination regarding the charge of fourteen cents for the barrel package, in addition to the fifty-two cents for the carriage of the oil per barrel, as against fifty-two cents per barrel by tank cars, without any charge for the package, lay in the fact that the choice was not open generally to shippers, and that the case was one where both modes of transportation are employed by the carrier and the use of one, the tank cars, is not open to shippers impartially, but is practically limited to one class of shippers, and that the charge for the barrel package in barrel shipments, in the absence of a corresponding charge on tank shipments, resulted in a greater cost of transportation to the

shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, and that it was an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions had been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers.

The order of the Commission was filed November 14, 1892, and the proceedings were kept open for the purpose of ascertaining the amounts which were due the parties plaintiff on the theory adopted by the Commission.

The defendants did not comply with the order, but continued to charge the fourteen cents for the barrel, and the parties seeking reparation—that is, the recovery of the damage which they alleged they had sustained—applied for a hearing before the Commission to ascertain the amount thereof. The Commission proceeded thereafter, on proper notice, to determine the amounts due each of the claimants from September 13, 1888, the time of the commencement of the charge for the barrel transportation, to May 15, 1894, the time of the hearing before the Commission, and found (October 22, 1895) the amount due the plaintiff, the Penn Refining Company, Limited (among many other claimants), to be the amount already stated, arising, as found, from the transportation of barrels containing petroleum oil, shipped and carried by the railroads from Oil City and Titusville to Perth Amboy at fourteen cents per barrel in addition to fifty-two cents for its contents.

The Commission, in its reparation opinion, stated that the carriers had failed to notify the public, by publication in their tariffs of rates and charges, that they would, on reasonable notice, supply shippers who might apply therefor with tank cars for transportation to New York harbor points. The original order, directing the publication of these notices by defendants in their tariffs of rates, was entered November 14,

1892, while the period covered by the reparation order of October, 1895, giving damages, included four years, namely, from September, 1888, to November, 1892, before the making of such order. The Commission in its opinion also stated that tank cars had not been open to the use of shippers generally on the carriers' roads, but there was no statement or finding that plaintiffs had ever applied for such cars or desired them or had been refused. The companies did not comply with the order of reparation, and the Commission then commenced (some time in 1896) a proceeding in its own name in the Circuit Court of the United States, in equity, to enforce all the directions contained in the orders, including the provision for the payment of the money damages found due the various claimants. Upon demurrer that court held that the latter provision could not be enforced in equity, as the railroads were entitled to a jury trial on the issue as to the amount of the money recovery, and that the order in regard to the amount due ought to be enforced by each plaintiff in his own name. *The Interstate Commerce Commission* v. *Western New York & Pennsylvania R. R. Co.*, 82 Fed. Rep. 192, 195.

Thereupon, and in April, 1901, this proceeding by petition was commenced in the United States Circuit Court for the Western District of Pennsylvania by the Penn Refining Company, Limited, to recover the amount of the money reparation directed by the Commission. The Lehigh Valley Company demurred to the petition, which was overruled, and issue was then joined by all the defendants upon the material allegations of the petition, and the case was tried in March, 1902, and a verdict found for the plaintiffs against all the defendants.

Mr. James W. Lee and *Mr. Samuel S. Mehard*, with whom *Mr. Eugene Mackey* and *Mr. M. J. Heyward* were on the brief, for plaintiff in error.

Mr. John G. Johnson, with whom *Mr. Francis I. Gowen* was on the brief, for defendants in error.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The questions arising on this writ of error are, in some respects, different in regard to the different railroads who are defendants in error, but as to the matters now to be discussed all occupy the same position.

In their petition to the Commission the petitioners in that proceeding complained of the rate of transportation of oil to Perth Amboy, fixed by the carriers at sixty-six cents per barrel, the weight of the barrel being included and charged for in that amount, which rate, it was asserted, was unreasonable and excessive.

In the opinion of the Commission, filed with its order, in referring to a former charge of fifty-two cents per barrel of oil without charging for the weight of the barrel, from the oil fields to Perth Amboy, it is said: "While this rate is fully as high as it should be in view of the nature of the traffic and the conditions surrounding it, and might possibly be made less without depriving the carriers of a fair remuneration for their service, we do not feel authorized under all the facts and circumstances disclosed by the record and evidence in these cases to order a reduction in addition to the exclusion of the charge for the barrel package" (fourteen cents); "and our conclusion is that the rate to New York points should be not more than 16½ cents per hundred pounds, both in tank and barrel shipments, to be charged, in both cases, only for the weight or quantity of oil carried, exclusive of any charge for the package." Again the Commission, in its opinion, said: "In order to guard against misapprehension the Commission wishes to say that these cases are decided purely upon the facts as set forth in the situation as delineated in the record and by the evidence. It is not intended to hold, nor should this report be construed to hold, that, aside from other controlling circumstances, the carrier, in hauling packages, is not entitled to pay according to the weight thereof. It is simply held that

on account of the peculiar circumstances in these cases to charge for the weight of the barrel places barrel shippers at a disadvantage as against tank shippers, and the practice in these cases, while the circumstances and conditions remain unchanged, should be condemned." Upon referring to the order actually made by the Commission, its language is "that the action of the defendants in charging for the weight of barrels on shipments of refined oil in barrels over the several through lines formed by their respective railroads from Titusville, Oil City, and other points in the oil regions of western Pennsylvania, to New York, and other points in New York harbor, or to Boston and points called and known as Boston points, works unjust discrimination against the shipper of such oil in barrels in favor of shippers of the same commodity in tank cars, while said defendants refuse or neglect to furnish tank cars to complainants and other shippers for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; that rates per hundred pounds on shipments of oil in tanks or in barrels should be the same, and from said points in the oil regions of western Pennsylvania to New York harbor and Boston points such rates should not exceed 16½ cents and 23½ cents respectively, and that defendants should make reparation to complainants and others in all cases where charges on shipment in barrels between those points have included a charge for the weight of the barrel, and tank cars have not been open impartially to shippers of refined petroleum oil over their lines."

The defendants were also, by order of the Commission, "required to wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of western Pennsylvania to New York and New York harbor points, or to Boston and Boston points, *or*, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for

the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct, and that on or before the ninth of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges, pursuant to the provisions of § 6 of the act to regulate commerce, and also file copies of said tariffs with this Commission, as required by the provisions of said section; and defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within sixty days," etc., as set forth in the order.

By reference to the foregoing extracts from the opinion of the Commission it appears that they did not hold that the carrier in hauling barrels of oil was not entitled to pay for the weight thereof, including the package, but only that the peculiar circumstances of the case before it made it improper to charge for the weight of the barrel, because by such charge the shippers of oil in barrels were placed at a disadvantage as against shippers by tank cars, and although in one portion of the opinion it is stated that the charge of fifty-two cents per barrel, excluding the weight of the barrel package, was as high as it should be in view of the nature of the traffic and the conditions surrounding it, nevertheless the Commission gave the above quoted precise directions contained in its formal order. It made use of language by which the defendants were required to cease from charging for the transportation of the barrel package, *or*, on reasonable notice promptly furnish tank cars to complainant and other shippers who might apply therefor for the purpose of loading and shipping oil to New York harbor or Boston points, as the shippers might direct. This, of course, amounted and was equivalent to a holding that the charge for the weight of the barrel package of oil was not excessive. If the charge for the carriage of the barrel itself, taken in connection with the charge for the weight of the oil contained therein, made a total charge which was in and of itself excessive or unreasonably high (as was the complaint of the petitioners), of course the Commission would not

have permitted the charge, even if the petitioners had not applied for the use of tank cars. *East Tennessee &c. Railway Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 23; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 190 U. S. 273, 283. This limits the case against the defendants upon the finding of the Commission, to that of discrimination, which was decided to exist under the peculiar circumstances of the case, by reason of the charge for the barrel in which the oil was contained, while in tank cars the charge was limited to the oil carried.

We will therefore inquire what were the peculiar circumstances, as shown by the evidence, which led the Commission to make its order as to discrimination?

They were these:

1. That the railroads owned no tank cars.

2. That they transported oil in tank cars only for those shippers of oil who owned and furnished such cars. That in the case of oil intended for export by such owners it was sent to ports in New York harbor near Perth Amboy; the seaboard, and not Perth Amboy alone, being the place of competition between the plaintiffs and the Standard Oil Trust and others.

3. That the carrier hired tank cars from the shippers of the oil and paid for them a certain sum, measured by the miles run to and from the place of consignment.

4. That the tank cars, thus hired, were used exclusively to carry the oil of the owners of such cars. Other shippers of oil had their oil carried in barrels, in box cars, and a charge was made for the weight of the barrel containing the oil, while the charge for the oil in tank cars was limited to the amount of oil actually carried.

These facts, in the opinion of the Commission, rendered the case an exception to the usual rule as to the right to charge for the weight of package as well as its contents. In the view of the Commission, although it admitted that the transportation in tank cars was more profitable to the carrier in yielding a larger revenue above the cost of service than that in barrels,

yet the case was not presented "of two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper may take his choice and pay accordingly, but a case where the cheaper rated and, as claimed by the defendants, the better, mode of transportation was open practically to only a particular class of shippers." When, therefore, as was stated, "the carrier accepts tank cars owned by shippers who can afford to build and furnish them, and has none of his own to furnish to other shippers, but can supply only box cars, in which barrels must be used for oil, the carrier is bound to see that he gives no preference in rates to the tank shipper, and that he subjects the barrel shipper to no disadvantage."

These facts also appeared before the Circuit Court, and that court left it to the jury to find from them whether there was "undue discrimination" in favor of the shipper by tank cars and against the shipper by barrels, although the petition made no such allegation, but only alleged that the rates and charges for the service (sixty-six cents per barrel) were excessive, unjust and unreasonable. Discrimination was not alleged between the tank and the barrel car, for what would seem to be the obvious reason that the plaintiffs could make no use of the tank cars, as they had no facilities for unloading them at Perth Amboy and no vessels to export the oil in bulk, and the trade demand there was for oil in barrels. But, although, without such facilities and not being in position, therefore, to use such cars, the plaintiffs nevertheless demanded that no charge for transportation should be made for the barrel package, although the charge made was a reasonable one, unless a charge for the tank packages was made against those who used tank cars for the carriage of their oil to points adjacent to Perth Amboy, and although the transportation by tank cars was more remunerative to the companies than the transportation by barrels.

The whole theory of this discrimination rests upon the alleged failure to furnish tank cars to shippers demanding

them, while at the same time the defendants leased tank cars from their owners and used them to carry the oil of such owners exclusively, and yet in this case there has been no such failure, because there has been no demand for such cars by the plaintiffs, who, for the reasons stated, had no use for them.

Although in the opinion of the Commission in the reparation proceeding it was stated that the defendants had not notified the public as to supplying shippers with tank cars, as required by the order of November 14, 1892, while at the same time they denied to plaintiffs the use of such cars, yet there is no statement or finding that the plaintiffs had ever asked for such cars for the Perth Amboy station, and the proof is they did not want them for that point. In the course of the opinion some general observations were made in regard to the failure to supply tank cars, and the consequent necessity for the shippers to ship their oil in barrels and pay transportation on the total weight of the oil and the barrels. The opinion was delivered in two different proceedings, in which all the facts were not identical, one regarding Perth Amboy and the other Boston and adjacent points, and we cannot suppose that the Commission meant to include Perth Amboy in the opinion on this point, because the facts already adverted to furnish ample reasons for not demanding or using tank cars.

It is, therefore, apparent that the failure of plaintiffs to use tank cars during substantially all the period covered by the reparation order was not owing to a refusal or omission of the defendants to supply them on demand, but because they, the plaintiffs, did not demand and could not use them economically for the transportation of oil to Perth Amboy. The opinion of the Commission must be read with reference to this evidence, which, although given on the trial before the court, states the facts existing at Perth Amboy during the time of investigation by the Commission.

If it be assumed that it was the duty of the railroads to furnish tank cars to those who demanded them while the

railroads continued to hire that kind of car from owners in which to carry their oil, yet the failure to furnish them to a party that did not desire and had not demanded them certainly ought not to render it necessary for the railroads to carry the barrel package free because no charge was made for the tank package. The Commission said it may be conceded that the amount of paying freight was materially greater in tank than in barrel shipments, and that the tank car, after adding the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with its full load of oil barrels. Nevertheless it was stated that the facts already adverted to made out a case of unjust discrimination between the tank and barrel shipper, and it was so adjudged in this case where a shipper did not use or demand a tank car.

We are unable to concur in this view. Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one), while none is made for the tank containing the oil. It might be different if plaintiffs desired tank cars and defendants failed to furnish them on demand.

If the carrier must take off such charge for the weight of the barrel, although tank cars are not demanded, the result is to make the defendants carry the barrels free from freight charges, even while the shippers were unable to use and did not demand tank cars.

It is not incumbent, therefore, upon this court to now decide what would be the duty of the carrier as to furnishing tank cars to those who desired and demanded but did not own them, where the railroads accepted tank cars, owned by other shippers of oil, for the purpose of carrying their oil alone, and to different points than Perth Amboy. We are dealing with a case where such question does not arise.

There are other reasons in addition to the foregoing why the Lehigh Valley should not be held for any discrimination

in this case. That company was but a connecting carrier and took the cars as they were delivered to it by the initial carrier at Buffalo for transportation to Perth Amboy. It was the duty of the connecting carrier to do so, and it was not rendered liable for any alleged wrongful act of the initial carrier merely because of the adoption of a joint through rate from Titusville or Oil City to Perth Amboy, which was in itself reasonable. Nor did the eighth section of the commerce act render it liable for any such alleged wrongful act asserted against the initial carrier.

These views render it unnecessary to consider the objection to the recovery, taken by the defendants in error, based upon the fact that the petition to the Commission asked for relief on the ground that the charges were unreasonably high, while the relief granted was based upon discrimination, a charge not contained in the pleading. For the reasons already stated, the judgment of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE MOODY, dissenting.

In my opinion there was evidence which tends to support the plaintiff's cause of action, and I think that it should have been, as it was, submitted to the jury. It appeared that the plaintiff was engaged in shipping oil, destined for export, from the oil regions in Pennsylvania to Perth Amboy. Up to September, 1888, the transportation rate was fifty-two cents per barrel, and that rate applied, whether the oil was carried in barrels or in tank cars. At that rate the plaintiff was able to ship oil in competition with other producers. In September, 1888, the rate for shipment in barrels was changed to sixty-six cents per barrel, while the rate was left unchanged where the oil was carried in tank cars. The evidence tended to show that, in view of the number, ownership, and management of all the tank cars in existence, the new rate was practically prohibitory of barrel shipments from the Pennsylvania oil

regions to the seaboard, that it was designed by a competitor who influenced the defendants to impose it to have this effect, and that this was the only method of shipment practically open to the plaintiff. Under these circumstances the plaintiff joined with others in a complaint to the Interstate Commerce Commission. Section 3 of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, makes it "unlawful . . . to subject . . . any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever," as well as to give any person or kind of traffic an undue preference or advantage. The plaintiff might have brought an action for damages under §§ 8 and 9 of the act, but it chose to make complaint to the Commission, thereby electing that as the exclusive remedy. The Commission, after a hearing, adjudged that the sixty-six cent rate worked unjust discrimination against barrel shipments, and ordered the defendants to make reparation to the plaintiff and others. The amount of the reparation was afterwards ascertained. An order prescribing the tariff in the future was made, but its terms do not seem to be material, as the claims for reparation were for the time between the establishment of the discriminating rate and the making of the Commission's order. The order for the future may or may not be a valid and enforceable one. The plaintiff's right under that order, in the absence of a demand for tank cars, may be uncertain. We need not pursue those inquiries. Here the only question is of the right of the plaintiff to recover damages for the alleged discriminatory rate collected from it before and not after the order of the Commission. The defendants declined to make the reparation ordered by the Commission, and the plaintiff sought to recover it by an action, brought under § 17 of the act, in which the defendants were entitled to a trial by jury. On the trial the statute makes "the findings of fact *prima facie* evidence of the matters therein stated." They with other evidence were submitted to the jury. The jury was instructed that whether the plaintiff had been subjected to

undue prejudice was a question of fact. The jury was further instructed as follows:

"In arriving at that conclusion, it is proper to call your attention to this point—that the mere fact that there is or may be a preference or advantage given, where refined oil is shipped in some other way—for example, in tank cars—and that a more favorable rate is given to tank car shippers, does not, in and of itself, show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that the jury, before it can adjudge these companies to have acted unlawfully, to have subjected refined oil in barrels to any undue or unreasonable prejudice or disadvantage, must ascertain the facts and must give due regard to these facts and matters which railroad men, apart from any question arising under the statute, would treat as calling for a preference or advantage to be given—for example, in this case, to oil shipped in such tanks. All such facts may and ought to be considered and given due weight by the jury in forming its judgment, whether such preference or advantage is undue or unreasonable. In the complexity of human affairs, and especially in commercial affairs, absolute uniformity is well-nigh impossible, and some prejudice or disadvantage often occurs where men desire to act with the utmost fairness. It is, however, where such prejudice or disadvantage in interstate commerce reaches the measure of undue or unreasonable that the act makes it unlawful.

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs, and justly, fairly and impartially to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established between these two companies (if you find that to be the fact) did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"If you so find, you will also determine to what extent was the rate undue and unreasonable, and whatever amount you

so find under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made and on which it has paid the undue and unreasonable amount. You will understand that it is not entitled to recover all the freight it paid, because part of it was undue and unreasonable, but it is only such part of the freight as you find to be undue and unreasonable that the plaintiff is entitled to recover back, and that only upon proof to you of the amount of the shipments made by it upon which the freight was unduly and unreasonably charged."

These instructions seem to me full and appropriate. The jury found a verdict for the plaintiff, thereby affirming that "the particular description of traffic" in which the plaintiff was engaged was subjected to "undue or unreasonable prejudice or disadvantage." I am not persuaded that we can say, as matter of law, that there was not sufficient evidence to be submitted to the jury and to warrant the verdict. Nor do I see any reason why the Lehigh Valley Railroad should not be held responsible. It had, with the other defendant, established a joint tariff for a continuous shipment between the States. That tariff has been found to be discriminatory and unlawful. It has received its share of the unlawful exaction. The eighth section of the act provides that a carrier who "shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful" shall be liable to the full amount of the damages sustained by one injured thereby. I see no escape for this defendant from this provision.

There may have been error committed during the trial which would require that the verdict should be set aside and a new trial granted. It is not necessary for me to consider this question. I go no further than to dissent from the judgment of the court, which in effect denies the right of the plaintiff to recover upon the evidence against any of the defendants.

I am authorized to say that MR. JUSTICE HARLAN concurs in this dissent.